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No.

In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

On January 26, 1998, this Court granted certiorari to review the Eighth Circuit's decision, arising from this same review proceeding, limiting the jurisdiction of the Federal Communications Commission (FCC) to issue rules implementing the "local competition provisions" (47 U.S.C. 251 *et seq.*) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56. See *FCC* v. *Iowa Utilities Board*, No. 97-831, and related cases. On January 22, 1998, the Eighth Circuit issued a writ of mandamus, ostensibly to "enforce the mandate" of its earlier decision, limiting the FCC's distinct authority to make substantive determinations central to the eligibility of the Bell Operating Companies to enter the long-distance telephone market under 47 U.S.C. 271. The question presented here is whether that mandamus order is consistent with the Commission's obligation to make the long-distance eligibility determinations required by Section 271 and is properly within the scope of the Eighth Circuit's jurisdiction.

PARTIES TO THE PROCEEDINGS

The petitioners are the Federal Communications Commission and the United States of America.

This petition seeks review of an order arising from the same underlying proceedings as the order challenged in *AT&T Corp.* v. *Iowa Utilities Board*, cert. granted, No. 97-826 (Jan. 26, 1998). The parties to these proceedings are listed in the appendix to the petition for a writ of certiorari in that case at 1a-4a, 73a-78a, 92a.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States and the Federal Communications Commission (FCC or Commission), petitions for a writ of certiorari to review the writ of mandamus issued by the United States Court of Appeals for the Eighth Circuit in this case on January 22, 1998. This Court granted certiorari on January 26, 1998, to review the principal opinions issued by the court of appeals in the same case. See *FCC* v. *Iowa Utilities Board*, No. 97-831, and related petitions.

OPINIONS BELOW

The mandamus order and the accompanying opinion of the court of appeals (App., *infra*, 1a-20a) are not yet reported, but can be found at 1998 WL 30655. An earlier opinion of the court of appeals, on which the mandamus order is based, is reported at 120 F.3d 753, and is printed in the appendix to the petition for certiorari (97-826 Pet. App.) in *AT&T Corp.* v. *Iowa Utilities Board*, cert. granted, No. 97-826 (Jan. 26, 1998), at 1a-67a. The other

opinions issued in the underlying review proceeding are noted at 97-831 Pet. 1-2. The FCC's order in *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC No. 97-298 (Aug. 19, 1997) (excerpts printed at App., *infra*, 21a-34a), is unreported, but can be found at 1997 WL 522784. We have lodged 15 copies of that order with the Clerk of this Court.

JURISDICTION

The court of appeals issued a writ of mandamus and an accompanying order on January 22, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and, in the alternative, on 28 U.S.C. 1651(a).

STATUTORY PROVISIONS INVOLVED

Sections 271 and 402(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, are printed in the appendix to this petition (App. 35a-50a). Other relevant provisions of the 1996 Act appear at 97-826 Pet. App. 93a-130a. In referring to the provisions of the 1996 Act, we have cited the 1996 Supplement to the United States Code.

STATEMENT

On January 26, 1998, this Court granted certiorari to review the Eighth Circuit's decision in *Iowa Utilities Board* v. *FCC*, 120 F.3d 753 (1997) (*Local Competition Decision*). See Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, 97-1141. The *Local Competition Decision* greatly restricts the FCC's jurisdiction to issue rules implementing the provisions of the Telecommunications Act of 1996 (47 U.S.C. 251 *et seq.*) that are designed to open

local telephone markets to full competition.[1] On January 22, 1998, ostensibly to "enforce the mandate" of its earlier decision, the court of appeals issued a writ of mandamus severely limiting the FCC in the exercise of its authority to determine whether the Bell Operating Companies have met certain key conditions for full entry into the long-distance market. See 47 U.S.C. 271 (reprinted at App. 35a-48a). That mandamus order, which the Eighth Circuit issued just four days before this Court granted certiorari to review the *Local Competition Decision*, is the subject of this petition.

1. For many years, most telephone service in the United States—both local and long-distance—was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In the 1970s, the United States sued AT&T under the Sherman Act, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *American Tel. & Tel. Co.*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions, while AT&T continued to provide nationwide long-distance service.

The consent decree prohibited the Bell Companies themselves, however, from providing long-distance service. See *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 186 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). They were permitted to provide telephone service "only between points within a

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[1] The statutory background and procedural posture of this case are discussed at greater length in our petition for certiorari in *FCC* v. *Iowa Utilities Board*, cert. granted, No. 97-831 (Jan. 26, 1998).

single LATA, providing what is, basically, the traditional local telephone service." *United States* v. *Western Electric Co.*, 969 F.2d 1231, 1233 (D.C. Cir. 1992), cert. denied, 507 U.S. 951 (1993).[2] In approving that restriction, the district court overseeing the consent decree explained that a Bell Company, if permitted to enter the long-distance market, could use its monopoly control over local bottleneck facilities to impede long-distance competition in two principal ways: it could subject competitors to discriminatory terms of access to the local network, and it could cross-subsidize its own long-distance operations with its monopoly local revenues. *American Tel. & Tel. Co.*, 552 F. Supp. at 187-188, 223.

2. The Telecommunications Act of 1996 transformed the regulation of all telephone markets, to open local markets to competition for the first time and to enhance the competition that had proliferated in the long-distance market after the 1984 divestiture. To understand how the Act affects the long-distance market, however, it is first necessary to review how it alters regulation of local markets. See also 97-831 Pet. 2-8.

a. In the "local competition" provisions of the Act, 47 U.S.C. 251 *et seq.*, Congress entitled potential competitors to enter the local market by using the incumbent monopo-

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[2] To implement the decree's restriction on the provision of long-distance services, the district court divided the Bell Companies' collective geographical regions into more than 160 exchange areas, known as "local access and transport areas" or "LATAs." See *United States* v. *Western Electric Co.*, 569 F. Supp. 990 (D.D.C. 1983). For ease of exposition, we refer to inter-LATA calls in the vernacular: as "long-distance calls." (Such calls should not be confused with the somewhat larger category of "toll calls," which includes some *intra*-LATA calls that the decree permitted the Bell Companies to carry.) Most, but not all, inter-LATA calls cross state boundaries. In 1996, interstate inter-LATA calls accounted for approximately 73% of all inter-LATA call minutes. See FCC, *Preliminary Statistics of Communications Common Carriers*, Table 2.6 (1996).

list's own network in three distinct but complementary ways. See 47 U.S.C. 251(c)(2)-(4). First, Section 251(c)(2) requires incumbent local exchange carriers (LECs)[3] to "interconnect" their networks with those of other carriers, and to do so at "just, reasonable, and nondiscriminatory" rates and terms. Second, Section 251(c)(3) gives potential competitors a right to gain "unbundled access" to elements of an incumbent LEC's network: *i.e.*, to lease individual network elements (*e.g.*, telephone wires, switching capability, etc.) at separate prices, which also must be "just, reasonable, and nondiscriminatory." Finally, Section 251(c)(4) gives potential competitors a right to buy an incumbent LEC's retail services "at wholesale rates" and then to resell them to end users.

A separate provision, 47 U.S.C. 252, sets forth the procedures that individual entrants and incumbent LECs must follow when implementing those core requirements of Section 251. Section 252 provides for a period of negotiation between incumbents and new entrants, followed by expeditious arbitration by state public utility commissions of any unresolved issues.[4] Section 252(c)(1) requires state arbitrators to conform their disposition of "open issues" in such agreements to federal standards: to "the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251."

With particular respect to arbitration of open *rate* issues, Section 252(c)(2) provides that, in addition to the re-

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[3] A number of incumbent LECs, particularly those that serve small and mid-size markets, were independent of the Bell System before the decree and are today unaffiliated with any Bell Company. Nonetheless, the Bell Companies—along with GTE, which has acquired many "independent" LECs in recent years—are by far the largest incumbent LECs in the United States. Collectively, the Bell Companies provide nearly 80% of local telephone service in the United States.

[4] Congress directed the FCC to resolve such disputes whenever a state commission opts out of its statutory role. See 47 U.S.C. 252(e)(5).

quirements of Section 251, rates for interconnection under Section 251(c)(2) and unbundled elements under Section 251(c)(3) must be "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)" and "may include a reasonable profit," 47 U.S.C. 252(d)(1). Section 252(d)(3) provides that the "wholesale rates" charged to resellers under Section 251(c)(4) must be based on retail rates, excluding the portion of those rates attributable to "costs that will be avoided." And Section 252(d)(2) sets forth a reciprocal compensation scheme for transport and termination of telephone traffic. All agreements approved or arbitrated by state commissions are subject to review in federal district court—and not in any state court—to determine whether they "meet[] the requirements" of Sections 251 and 252. See 47 U.S.C. 252(e)(4) and (6).

b. As part of a comprehensive legislative package that breaks down barriers to competition in all telecommunications markets, the 1996 Act also sets forth a procedure, codified in 47 U.S.C. 271, under which the Bell Companies may seek authorization from the FCC to provide, for the first time, the long-distance services that the 1982 consent decree had prohibited them from offering. See Pub. L. No. 104-104, Tit. VI, § 601(a)(1), 110 Stat. 143 (superseding decree); *United States* v. *Western Electric Co.*, No. 82-0192, 1996 WL 255904 (D.D.C. Apr. 11, 1996).

With limited exceptions not applicable here, Section 271 bars a Bell Company from providing long-distance services originating in its "in-region" States—*i.e.*, the States in which it has traditionally exercised monopoly power over local service—unless it first applies for, and receives, authorization from the FCC to do so. See 47 U.S.C. 271(a) and (b)(1). The FCC may grant such an authorization only if "it finds" that the Bell Company has satisfied the requirements of a "competitive checklist" designed to open

the Bell's own local exchange markets to fair competition (see 47 U.S.C. 271(c)(2)); that the Bell Company will conduct its long-distance operations in accordance with the structural separation requirements set forth in 47 U.S.C. 272; and that granting the application would serve "the public interest, convenience, and necessity." 47 U.S.C. 271(d)(3).[5]

Among the requirements on the checklist are "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)"; "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)"; "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)"; and the availability of telecommunications services "for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." 47 U.S.C. 271(c)(2)(B)(i), (ii), (xiii) and (xiv). Section 271 thus bars

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[5] Congress anticipated that, in many but not all cases, potential new entrants will have sought to enter a Bell Company's market under Sections 251 and 252 before the Bell Company has filed an application under Section 271. Congress thus provided for two different scenarios under which a Bell Company may seek to demonstrate its compliance with the substantive requirements of the checklist: either by (*inter alia*) "enter[ing] into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities," 47 U.S.C. 271(c)(1)(A), or, if no new entrant "has requested the access and interconnection described in subparagraph (A)" within a certain time period, by ensuring that "a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f)," 47 U.S.C. 271(c)(1)(B). With respect to the first scenario, the Commission may not grant a Section 271 application "unless it finds that * * * [the Bell Company] has fully implemented the competitive checklist." 47 U.S.C. 271(d)(3)(A)(i). With respect to the second scenario, the Commission may not grant the application "unless it finds that * * * [the] statement offers all of the items included in the competitive checklist." 47 U.S.C. 271(d)(3)(A)(ii).

the FCC from granting a Section 271 application unless "it finds," among other things, that the Bell Company has complied with "the requirements" of Sections 251(c) and 252(d), including (for example) the standards that those provisions impose for the rates of interconnection, unbundled access, and resale. See pp. 5-6, *supra*.

Congress directed the FCC both to "consult with the Attorney General" before ruling on a Section 271 application and to "give substantial weight to the Attorney General's evaluation" of the application. 47 U.S.C. 271(d)(2)(A); see pp. 22-23, *infra*. By contrast, while Congress directed the Commission to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements" of the checklist, it did *not* require the Commission to give any particular weight, or any weight at all, to the state commission's views on the merits of the application. 47 U.S.C. 271(d)(2)(B). The Commission must either approve or deny a Section 271 application within 90 days of its receipt. 47 U.S.C. 271(d)(3). Congress conferred a right of judicial review on "any * * * person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application" under Section 271, and it gave the District of Columbia Circuit exclusive jurisdiction to hear such suits. 47 U.S.C. 402(b)(6) and (9) (reprinted at App. 49a-50a).

3. Section 251(d)(1) directs the Commission, within six months of the Act's passage, to complete "all actions necessary to establish regulations to implement the requirements" of Section 251. 47 U.S.C. 251(d)(1). Accordingly, on August 8, 1996, the Commission issued its First Report and Order implementing the local competition provisions of the new Act. See *In re Implementation of Local Competition Provisions of the Telecommunications Act of*

1996, 11 FCC Rcd. 15,499 (1996) (First Report and Order) (lodged with this Court in No. 97-826; excerpts printed in 97-826 Pet. App. 131a-337a).

The Commission first determined that Congress had given it statutory authority to set general standards for implementing, among other things, the Act's core rate provisions: *e.g.*, the provisions requiring incumbent LECs to permit interconnection with their networks, and to provide unbundled access to network elements, at "just, reasonable, and nondiscriminatory" rates, 47 U.S.C. 251(c)(2) and (3), which must be "based on * * * cost (determined without reference to a rate-of-return or other rate-based proceeding)," 47 U.S.C. 252(d)(1). In light of that language, the Commission concluded that, to ensure competition in local markets, the rates for interconnection and access to unbundled network elements should be based on economic (*i.e.*, forward-looking) costs rather than on the "embedded costs" reflected on the ratemaking accounting books. See First Report and Order ¶ 620. In brief, the forward-looking cost methodology adopted by the Commission—"total element long-run incremental costs"—asks what it would cost to construct and operate an efficient telephone network today, and it creates a framework for setting prices for network elements on that basis. See *ibid.* The Commission's approach would preserve for the state commissions the complex and important task of applying that methodology to establish actual carrier-to-carrier rates in light of carrier-and region-specific variables such as geography, population density, and so forth. See 97-831 Pet. 15-16.

On July 18, 1997, the Eighth Circuit issued its *Local Competition Decision*, vacating extensive portions of the First Report and Order on jurisdictional grounds, including the portions dealing with pricing issues. Among other things, the court held that Sections 252(c)(2) and (d)

give state commissions exclusive authority to interpret the pricing terms of Sections 251 and 252 and implicitly deny the Commission any rulemaking role in that area. 97-826 Pet. App. 10a-14a. The court did not, however, consider the substance of the Commission's determination that, to comply with the Act, rates must be based on forward-looking costs. Nor, of course, did it address the Commission's distinct authority to adjudicate Bell Company long-distance applications under Section 271, a question that was not before it. As noted above, this Court granted certiorari on January 26, 1998, to review, among other things, the jurisdictional holding of the *Local Competition Decision*.

4. On May 21, 1997, Ameritech Corporation—a Bell Company providing local exchange service in several midwestern States—filed a Section 271 application to provide in-region long-distance service in Michigan. On August 19, 1997, the FCC denied the application. *In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC No. 97-298 (*Ameritech Order*) (15 copies lodged with this Court; excerpts printed at App. 21a-34a). The Commission determined that Ameritech had failed to satisfy at least three checklist requirements: interconnection, access to "operations support systems," and nondiscriminatory access to 911 and E911 services. *Ameritech Order* ¶¶ 128-279; see 47 U.S.C. 271(c)(2). The Commission also found that Ameritech had failed to demonstrate compliance with certain structural and transactional requirements imposed by 47 U.S.C. 272. *Ameritech Order* ¶¶ 344-373.

Because it denied the application on those grounds, the FCC did not finally decide another set of questions that had been presented: "whether Ameritech's pricing of

checklist items complies with the requirements of section 271." App. 21a-22a. Nonetheless, because several parties had sought guidance on a variety of issues, including pricing, the Commission took the opportunity to examine the general content of the checklist requirements, in the hope that "this discussion will help expedite Ameritech's entry into long distance in Michigan and the entry of the other [Bell Companies] into the in-region interLATA market by providing more guidance as to what showing is required in future applications to demonstrate full compliance with the checklist." *Id.* at 22a.

The Commission concluded that, to perform its "exclusive responsibility" under Section 271 "for determining whether a BOC has in fact complied with the competitive checklist," it "must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination, and resale in accordance with the pricing requirements set forth in Section 252(d)." *Id.* at 23a. The FCC acknowledged that, in the *Local Competition Decision*, the Eighth Circuit had held that the Commission lacks statutory authority to issue national rules implementing the pricing terms of the local competition provisions. App. 23a-24a. The Commission noted, however, that the Eighth Circuit had "made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based." *Id.* at 24a. The Commission also observed that, whether or not it has jurisdiction to issue binding regulations implementing the pricing provisions of Sections 251 and 252 for purposes of specific interconnection agreements, no reasonable understanding of the statutory scheme could foreclose it from interpreting those provisions when adjudicating Section 271 applications. *Id.* at 24a-28a.

As the Commission explained, if the *Local Competition Decision* is permitted to stand, the meaning of the Act's

pricing terms will be determined over the course of many years, in piecemeal federal court litigation under 47 U.S.C. 252(e)(6); throughout that period, however, the Bell Companies will file Section 271 applications that the FCC must approve or deny within 90 days after their receipt. App. 24a-25a; see 47 U.S.C. 271(d)(3). Because nothing in Section 271 remotely suggests that "the Commission's bases for determining checklist compliance should * * * vary throughout the country," the FCC concluded that it "must apply uniform principles to give content to the cost-based standard in the competitive checklist for each * * * section 271 application." App. 26a-27a. And, the Commission added, "even if it were decided that we lacked authority to review [Bell Company] prices as an aspect of our assessment of checklist compliance under section 271(d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C)." *Id.* at 28a. Finally, on the substance of the pricing issues, the Commission determined that, in any future Section 271 application, Ameritech or any other Bell Company must demonstrate that its prices for interconnection, unbundled elements, and transport and termination are based on forward-looking, rather than embedded, costs. *Id.* at 28a-30a.

5. Neither Ameritech nor any other party appealed the *Ameritech Order* to the D.C. Circuit, which, as noted, has exclusive appellate jurisdiction to review Section 271 orders. Instead, in September 1997, the Bell Companies returned to the Eighth Circuit, joined by their trade association, a group of state commissions, and the National Association of Regulatory Utility Commissioners. They claimed that the passages of the *Ameritech Order* addressing the Commission's authority to interpret the content of Section 271's "competitive checklist" violated the

"mandate" of the Eighth Circuit's *Local Competition Decision*.

On January 22, 1998, the Eighth Circuit granted the motions to enforce the mandate and issued a writ of mandamus that substantially controls the substance of the Commission's orders under Section 271. Specifically, the Eighth Circuit ordered the Commission "to confine its pricing role under section 271(d)(3)(A) to determining whether applicant [Bell Companies] have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such [Bell Companies] seek to provide in-region, inter-LATA services." App. 2a; see also *id.* at 15a (rejecting any Commission "attempt to utilize section 271(d)(3)(C)" to resolve pricing issues). The court reasoned that, in interpreting the scope of its authority under Section 271, the FCC had improperly "reassert[ed] the vacated pricing rules by imposing them as conditions for entry by the Bell Operating Companies into the in-region, interLATA telecommunications business." *Id.* at 8a.

The Eighth Circuit then turned to the question of its own jurisdiction to review this matter. It acknowledged that 47 U.S.C. 402(b) gives the D.C. Circuit exclusive jurisdiction to review Commission orders granting or denying Section 271 applications. App. 18a. The court held, however, that it could sidestep that jurisdictional constraint by crafting "a forward-looking remedy" that would "leave the FCC's Ameritech Order untouched." *Id.* at 19a. That remedy, the court declared, does no more than "enforce our mandate in order to disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated in paragraphs 280-297 of the [Ameritech] Order." *Ibid.*

REASONS FOR GRANTING THE PETITION

The Eighth Circuit issued this mandamus order four days before this Court granted certiorari to review the Eighth Circuit's *Local Competition Decision*. While the mandamus order purports to do no more than "enforce the mandate" of the *Local Competition Decision*, it in fact adds an immense new obstacle to the FCC's implementation of the most important telecommunications legislation since 1934. The *Local Competition Decision* bars the Commission from issuing rules governing many of the core federal rights of new entrants to enter *local* telephone markets; the mandamus order now impairs the Commission's authority to make the statutory determinations that Congress directed it to make before granting or denying a Bell Company's application to enter the *long-distance* market. As discussed below, that order is irreconcilable with the language of Section 271 and with congressional intent; if left intact, it would compound the competitive uncertainties already created by the court's *Local Competition Decision*; and, by exerting control over present and future Section 271 proceedings, the Eighth Circuit improperly entered a specialized field that Congress quite deliberately assigned to the exclusive jurisdiction of the D.C. Circuit.

Although a reversal of the jurisdictional holding in the *Local Competition Decision* would, of itself, require invalidation of the mandamus order, an affirmance of that jurisdictional holding would cure neither the Eighth Circuit's independently erroneous reading of Section 271 nor its lack of jurisdiction to address the Commission's orders under that provision. For the reasons discussed below, we believe that the most appropriate course would be for this Court to grant this petition and consolidate its review of the mandamus order with the other issues that it has already agreed to review in this same case. At a minimum,

the Court should hold this petition pending completion of its review of the *Local Competition Decision*.

1. a. The language of Section 271, which the mandamus order scarcely addresses, could not be clearer in granting the FCC exclusive authority to determine a Bell Company's eligibility for entry into the long-distance market. First, Section 271 directs "the Commission" to grant a Bell Company's application only if "it finds," *inter alia*, that a Bell Company has "fully implemented" (or, in certain special circumstances, has offered to implement) all of the requirements of the competitive checklist. 47 U.S.C. 271(d)(3); see p. 7, *supra*. Those requirements include "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" and "[n]ondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. 271(c)(2)(B)(i), (ii).

The Commission's plenary authority to "find" whether or not a Bell Company has satisfied those statutory "requirements" necessarily encompasses the authority to interpret, in the first instance, what those requirements *are*: to determine, for example, whether a Bell Company has in fact met the "requirements" of Sections 251(c)(3) and 252(d)(1) if it charges new entrants for unbundled elements based on its own embedded costs rather than on forward-looking economic costs. The Eighth Circuit's approach, however, would transfer that basic interpretive authority from the FCC to the 50 state commissions. It would assign to each of those commissions—with potentially radical state-by-state differences in both methodology and outcome—basic aspects of "find[ing]" whether or not a Bell Company has complied with Sections 251(c) and 252(d). That approach is flatly inconsistent with the language of Section 271(d)(3)(A).

The Eighth Circuit's approach is likewise inconsistent with the Commission's independent textual obligations under Section 271(d)(3)(C), the "public interest" provision. Under that provision, even if the Commission "finds" formal compliance with the checklist, it may grant a Section 271 application only if it also "finds that * * * the requested authorization is consistent with the public interest, convenience, and necessity." 47 U.S.C. 271(d)(3)(C). Congress framed that public-interest inquiry with deliberate breadth. Before granting a Section 271 application, the Commission must consider, among a range of issues, the extent to which a Bell Company's local market is open to genuine competition and whether the Bell Company's own provision of long-distance services in its in-region States would preserve fair competition in the long-distance market. Because pricing issues play an important role in those inquiries, the Eighth Circuit's mandamus order—which, without explanation, bars the Commission from "utiliz[ing] section 271(d)(3)(C)" to intrude on what the court deems the States' "intrastate turf" (App. 14a-15a)—frustrates the Commission's statutory obligation, before granting an application, to "find" that Bell Company entry into the long-distance market would serve the public interest.

The Eighth Circuit's approach is also irreconcilable with the provisions of Section 271 addressing the respective roles of the Justice Department and the state commissions in the process of adjudicating Bell Company applications. Congress instructed the Commission to "consult with the Attorney General" on any such application *and* to "give substantial weight to the Attorney General's evaluation," while nonetheless making clear that "such evaluation shall not have any preclusive effect on any Commission decision." 47 U.S.C. 271(d)(2)(A). The joint statutory responsibilities of the FCC and the Justice

Department in this context reflect the federal government's historically central role—before and after adoption of the 1982 consent decree that led to the breakup of the Bell System—in overseeing the relationship between the Bell Companies' monopoly power in local markets and the development of fair competition in the long-distance market. See pp. 3-4, *supra*.

That relationship, however, has not been a subject of similar regulatory concern to the state commissions. Accordingly, Section 271 gives them a more limited role than the Justice Department in the application process, imposing on the Commission a procedural obligation to "consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of [the checklist]." 47 U.S.C. 271(d)(2)(B). In striking contrast to the provision of the immediately preceding subsection, which invests the Attorney General's views with "substantial weight," Section 271(d)(2)(B) does *not* require the Commission to give *any* particular weight—much less dispositive weight, as the Eighth Circuit would have it—to a state commission's legal evaluation of the Bell Company's claims of compliance with Sections 251(c) and 252(d)(1).

At bottom, the Eighth Circuit's mandamus order holds that, even though Congress directed the Commission to give "substantial weight" to the Attorney General's analysis but not to any views offered by the state commissions, the Commission must, at the same time, give core aspects of a state commission's analysis the kind of "preclusive effect" that Congress specifically withheld from any analysis offered by the Attorney General. That is illogical. Under the only sensible interpretation, Section 271 imposes on the Commission the unremarkable responsibility, before "find[ing]" that a Bell Company has met the "requirements" of the checklist, to interpret in the first

instance what those requirements are; and, before "finding] that * * * the requested authorization is consistent with the public interest," to determine, with unfettered analysis, what the public interest demands.

Finally, the Eighth Circuit's position misreads not just Section 271 itself, but also the most basic jurisdictional premise of federal telecommunications law. Congress created the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio." 47 U.S.C. 151. It authorized the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act," 47 U.S.C. 152(b), which "apply to *all* interstate and foreign communication by wire or radio," 47 U.S.C. 152(a) (emphasis added). In short, Congress gave the FCC plenary authority to regulate, among other things, interstate telecommunications. By assigning dispositive weight to each state commission's legal interpretation of core checklist provisions, however, the Eighth Circuit has thwarted the Commission's long-established authority to regulate the quintessential interstate telecommunications market: the market for long-distance calls, the clear majority of which are interstate calls. See note 2, *supra*, and note 6, *infra*; see also *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

Nothing in the 1996 Act authorizes that dramatic shift in interstate regulatory authority from the federal government to the States. To the contrary, the Act confirms precisely the opposite: that the federal government retains exclusive authority in this area. And, even if there were some conceivable ambiguity on that issue, the Commission's resolution of that ambiguity would be entitled to judicial deference, for "it is settled law that the rule of deference applies even to an agency's interpretation of its

own statutory authority or jurisdiction." *Mississippi Power & Light Co.* v. *Mississippi ex rel. Moore*, 487 U.S. 354, 381 (1988) (Scalia, J., concurring in the judgment).

The Eighth Circuit, however, ignored all of these issues. In defense of its order, it explained only that the FCC may not "accomplish indirectly" through Section 271 what the court barred it from doing "directly" under Sections 251 and 252. See App. 14a-15a.[6] That reasoning boils down to the following syllogism: (1) the August 1997 *Local Competition Decision* divested the Commission of jurisdiction to issue rules implementing the pricing provisions of Sections 251 and 252; (2) the Commission's interpretation of Section 271 would nonetheless permit the Commission to construe those pricing provisions for the specific purpose of adjudicating Bell Company long-distance applications; and (3) that interpretation must therefore be rejected to accommodate the *Local Competition Decision*.

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[6] In one passage, the court of appeals held that impairing the Commission's authority over interstate telecommunications in this context is necessary to "fence[] off intrastate matters from FCC regulation"—a result required, in the court's view, by Section 2(b) of the original Communications Act of 1934, 47 U.S.C. 152(b). See App. 14a-15a; see generally 97-831 Pet. 17-22 (discussing Section 2(b)). But, even apart from the other flaws in the court's reasoning (discussed in the text), it is settled that conflicts between state regulation of intrastate matters and the FCC's regulation of interstate matters must be resolved in favor of the latter; in particular, federal law supersedes any exercise of state regulation that would "prevent[] [the FCC] from discharging its statutory duty * * * to regulate interstate communication." *North Carolina Utils. Comm'n* v. *FCC*, 552 F.2d 1036, 1045 (4th Cir.), cert. denied, 434 U.S. 874 (1977); see also *Louisiana Pub. Serv. Comm'n*, 476 U.S. 355, 375 n.4 (1986); *Illinois Bell Tel. Co.* v. *FCC*, 883 F.2d 104, 112-116 (D.C. Cir. 1989). The Eighth Circuit's adoption of the contrary proposition—that federal regulation of interstate matters must yield to inconsistent state regulation of intrastate matters—deepens the conflict, first created by the *Local Competition Decision*, between the Eighth Circuit and the Fourth and D.C. Circuits on the meaning and effect of Section 2(b). See 97-831 Pet. 19-22.

As an initial matter, we dispute the Eighth Circuit's assumption that the Commission's implementation of Section 271 is irreconcilable with the holding of the *Local Competition Decision*. See pp. 27-28, *infra*. The deeper problem with the court's logic, however, is that Section 271 says, and means, precisely what the Commission construed it to mean. Any tension between that meaning and the *Local Competition Decision* is evidence not that Section 271 means something other than what it says, but that the *Local Competition Decision* was wrong. As we discuss below, that is one important reason why this Court should review the mandamus order at the same time that it reviews the *Local Competition Decision*, so that it may consider all relevant aspects of this interrelated statutory scheme at once.

b. On a practical level, the mandamus order, if left intact, would severely disrupt the federal scheme governing the entry of the Bell Companies into the long-distance market, just as the *Local Competition Decision* has already encumbered the process of bringing competition to local markets.

In that earlier decision, the Eighth Circuit construed the 1996 Act to grant each of the 50 state commissions plenary authority to interpret the federal pricing standards of Sections 251(c) and 252(d)(1) for purposes of resolving specific carrier-to-carrier interconnection disputes under Section 252. That holding, which this Court will review next Term, would permit the 50 state commissions to disagree with one another on such basic methodological issues as whether interconnection rates should be based on forward-looking economic costs or on an incumbent carrier's embedded costs. Those disagreements about the meaning of federal law would persist until, after many years of piecemeal litigation under 47 U.S.C. 252(e)(6) (see p. 6, *supra*), the federal courts have

settled on nationally consistent interpretations of the 1996 Act's central substantive provisions. As we have elsewhere explained, we do not believe that Congress intended to subject new entrants and the federal courts to that dilatory and exceptionally litigious regime; instead, in our view, Congress directed *the Commission* to address the most basic controversies arising under the local competition provisions by August 1996 so that those controversies could be consolidated in a single review proceeding and resolved soon thereafter. See 96-831 Pet. 22-24.

The mandamus order, however, has added a new dimension to the jurisdictional disarray originally created by the *Local Competition Decision*. By compelling the FCC to accept each state commission's peculiar pricing methodology when adjudicating Section 271 applications, the mandamus order requires the Commission *itself*—and no longer just the 50 state commissions—to reach inconsistent decisions on central interpretive issues arising under the Act, at least until the lengthy process of Section 252(e)(6) litigation has run its course. For example, if one state commission interprets the Act to confine rates for unbundled elements to forward-looking economic costs and another interprets it to permit recovery of embedded costs, those two state commissions would often disagree about whether a Bell Company's rates meet "the requirements of sections 251(c)(3) and 252(d)(1)." 47 U.S.C. 271(c)(2)(B)(ii). Where the outcome of a Section 271 application turns on compliance with those provisions, the mandamus order compels the Commission to reach different and incompatible results on identical facts, depending on the pricing methodology favored by the particular State in which the application arises; that inconsistency, in turn, could expose the Commission to charges of arbitrary and capricious decisionmaking.

Moreover, insofar as the mandamus order compels the FCC to accept not just each state commission's methodological choices but also each state commission's specific arbitration decisions, it could require the Commission to approve Section 271 applications despite serious questions about the Bell Company's compliance with any plausible understanding of either the checklist requirements or the public interest. The Commission could presumably be compelled, for example, to rubber-stamp any interconnection pricing policy upheld by a state commission, no matter how cursory the state commission's pricing analysis may be, and no matter how objectively clear it may be that the prices themselves would foreclose meaningful competition in local markets or even threaten fair competition in the long-distance market.[7] In fact, that rubber-stamp approval process could create an anomalous comparative advantage, which Congress surely never intended, for Bell Companies operating in States whose public utility commissions engage in less careful pricing reviews.

Finally, the Eighth Circuit made no effort to square the effects of its mandamus order with the express statutory role either of the Attorney General in recommending dispositions of Section 271 applications or of the D.C. Circuit in reviewing those dispositions. First, the mandamus

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[7] That could be so even if a carrier adversely affected by the original state commission finding seeks federal district court review of that finding under Section 252(e)(6). Section 271(d)(3) requires the Commission to adjudicate a Bell Company application within 90 days of its filing, and the resolution of any parallel proceeding under Section 252(e)(6) would generally not come until much later. The Eighth Circuit's ruling, moreover, creates the following anomaly: Whenever a district court *does* invalidate a state commission's pricing methodology as inconsistent with the Act, Section 271(d)(6) would require the Commission to reconsider, and perhaps revoke, its earlier order approving any application predicated on that methodology, because the Bell Company would have "ceased to meet [one] of the conditions required for such approval." 47 U.S.C. 271(d)(6).

order does not bind the Attorney General. Indeed, Section 271(d)(2)(A) explicitly authorizes the Attorney General, in her evaluation of each application, to employ "any standard [she] considers appropriate." As part of a comprehensive competition analysis—which focuses on whether local markets in the relevant States are fully and irreversibly open to competition—the Justice Department has advised the Commission, among other things, to employ a forward-looking cost methodology when reviewing Section 271 applications, because that approach best promotes fair competition in this context. *E.g.*, Evaluation of the United States Dep't of Justice, *In the Matter of Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in South Carolina*, CC Docket No. 97-208, 35-39 (Nov. 4, 1997). To the extent that the Department's analysis is inconsistent with a state commission's analysis, however, the mandamus order would compel the Commission to disregard the former—no matter how persuasive it may be—and thereby violate the Commission's own statutory obligation to "give substantial weight to the Attorney General's evaluation." 47 U.S.C. 271(d)(2)(A). Congress did not intend to place the Commission in that untenable position or to make the Attorney General's role meaningless. As Sections 271(d)(2)(A) and (B) make clear, the Commission need not give any particular weight, much less dispositive weight, to the analysis of the state commissions in this area.

The Eighth Circuit's mandamus order also cannot bind the D.C. Circuit, to which Congress assigned the exclusive role of reviewing the Commission's adjudication of Section 271 applications. In reviewing those applications, the D.C. Circuit will be asked, under traditional principles of administrative law, to enforce the Commission's statutory responsibility to make a variety of independent determinations about a Bell Company's entitlement to enter the

long-distance market. Because the mandamus order compels the Commission to abdicate much of that responsibility to the 50 state commissions, and because the D.C. Circuit would be unlikely to view that abdication as appropriate, the Commission could be faced with two mutually contradictory mandates: one issued by the court of appeals to which Congress gave exclusive jurisdiction over Section 271 orders, see 47 U.S.C. 402(b)(6) and (9), and the other issued by the Eighth Circuit, acting—as we next explain—beyond the scope of its jurisdiction. This Court should intervene now to foreclose that indecorous conflict before it arises.[8]

2. Apart from its invalidity on the merits, the mandamus order should be vacated for the independent reason that the Eighth Circuit was without jurisdiction to issue it. Despite that court's insistence that it had somehow left the *Ameritech Order* "untouched," App. 19a, there is simply no denying that the mandamus order reviews and condemns the content of the *Ameritech Order*, invests that condemnation with the force of law, and—just as important—exerts direct coercive control over the content of all of the Commission's Section 271 orders in the future. The content of such orders, however, is a matter that the Eighth Circuit has no lawful authority to address.

As we have discussed, the roles that Congress assigned to the FCC and the Justice Department in evaluating Section 271 applications reflect the federal government's traditional responsibility for overseeing the relationship, before and after the 1984 divestiture, between the Bell Companies' monopoly control over local markets and the

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[8] Review petitions challenging unrelated FCC orders denying Section 271 applications are now pending in the D.C. Circuit. See *SBC Communications Inc.* v. *FCC*, No. 97-1425 (argued Jan. 9, 1998); *BellSouth Corp.* v. *FCC*, No. 98-1019 (to be argued Sept. 25, 1998). Those cases will not require the D.C. Circuit to address the basic issues presented here.

development of competition in the long-distance market. Congress relied on similar considerations of institutional expertise in choosing the D.C. Circuit as the exclusive forum for review of "any order of the Commission granting or denying any application" under Section 271. 47 U.S.C. 402(b)(6) and (9). Until the 1996 Act superseded the AT&T consent decree, that court exercised appellate jurisdiction over all aspects of the decree's implementation and, in the process, developed a unique familiarity with the complex legal and economic issues arising in this area.

In exerting control over the content of the Commission's Section 271 orders, therefore, the Eighth Circuit's preemptive strike ignores Congress's deliberate decision to consolidate review of all Section 271 orders in the one court of appeals that, in Congress's view, is institutionally best equipped to address them.[9] The Eighth Circuit cannot justify that expropriation of adjudicatory power as somehow necessary to enforce the mandate of the *Local Competition Decision*. Whether that earlier decision has preclusive effects on the Commission's Section 271 decisions is one issue; the proper forum for adjudicating disputes about the nature and extent of those effects, however, is quite another. The D.C. Circuit is entirely

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[9] Other courts of appeals have broadly construed the scope of the D.C. Circuit's exclusive jurisdiction over the matters addressed in 47 U.S.C. 402(b), which gives that court exclusive jurisdiction to review enumerated categories of FCC orders. For example, the courts have recognized the D.C. Circuit's exclusive jurisdiction to review a variety of FCC decisions that do not themselves fall within a specific category of order reserved for the D.C. Circuit's review under Section 402(b) but that are nonetheless "ancillary to" or "in aid of" the FCC's authority to issue such orders. See, *e.g.*, *WHDH, Inc.* v. *United States*, 457 F.2d 559, 561 (1st Cir. 1972); *Cook, Inc.* v. *United States*, 394 F.2d 84, 87 (7th Cir. 1968). Here, however, the Eighth Circuit's mandamus order is inappropriate for the simpler reason that the FCC order it reviewed falls squarely *within* a category of order that Congress has explicitly assigned to the exclusive province of the D.C. Circuit.

competent, when exercising its exclusive statutory jurisdiction under Section 271, to give the *Local Competition Decision* any preclusive effect it may be due. And, except in extraordinary circumstances not applicable here, mandamus is wholly inappropriate "as a mode of review where a statutory method of appeal has been prescribed." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 27-28 (1943); see also *In re Sindram*, 498 U.S. 177, 179 (1991) (per curiam); *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988).[10]

Moreover, for a mandamus order to be a valid exercise of authority under the All Writs Act, 28 U.S.C. 1651(a), the case that it affects must "be one that may lie within the prospective future jurisdiction of the court of appeals, *or* that has in fact come within its jurisdiction in the past." 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and*

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[10] There is no substance to the Eighth Circuit's accusation that, by announcing Section 271 principles prospectively in the course of adjudicating a Section 271 application, the Commission has "attempt[ed] to forum-shop" and has sought "another bite at the apple in the District of Columbia Circuit." App. 18a. It is Congress, not the Commission, that chose the D.C. Circuit as the exclusive forum for review of Section 271 orders; and it is respondents, not the Commission, that went shopping for a different forum. There is similarly no merit to the Eighth Circuit's efforts to justify its involvement in the Section 271 process on the theory that the relevant portion of the *Ameritech Order* may be "unreviewable on direct appeal" in the D.C. Circuit. *Ibid.* To provide guidance to the telecommunications industry, that portion of the order adopts criteria for the adjudication of Section 271 applications, and it defines the rights and responsibilities of the Bell Companies in this context. Under 47 U.S.C. 402(b)(6) and (9), any party that is in any way "aggrieved" or "adversely affected" by the *Ameritech Order* could have sought review in the D.C. Circuit, but none did. In any event, any ripeness concerns the Eighth Circuit may have had concerning reviewability in the D.C. Circuit would of course apply as well to mandamus review in the Eighth Circuit. If the D.C. Circuit were powerless to review issues concerning the FCC's statutory authority until presented with a Section 271 application whose outcome turned on those issues, the same ripeness considerations would also bar the Eighth Circuit from short-circuiting the Section 271 process by adjudicating those issues before then.

Procedure § 3932, at 471 (2d ed. 1996) (emphasis added); see also *id.* at 477 ("a court of appeals could not issue a writ to a district court sitting in another circuit, *nor to any other tribunal properly reviewable only in another circuit*") (emphasis added); *Ojeda Rios*, 863 F.2d at 204-205; *Telecommunications Research and Action Center* v. *FCC*, 750 F.2d 70, 77-78 (D.C. Cir. 1984). The *Ameritech Order* and the Commission's future Section 271 orders, however, are obviously separate cases from the local-competition rulemaking proceeding that the Eighth Circuit did have jurisdiction to review; they are cases *that have never been and can never be* in the Eighth Circuit. A court may not properly enforce its mandate in one case by issuing mandamus to influence the course of a *different* case falling within a category of cases over which another court has been given *exclusive* statutory jurisdiction. Indeed, there is no obvious limiting principle that would keep the Eighth Circuit, now that it has strayed this far into the exclusive jurisdiction of other courts, from issuing writs of mandamus whenever it dislikes some aspect of an FCC opinion that, in the Eighth Circuit's own view, may be in tension with the *Local Competition Decision*. But that is not a proper role for the Eighth Circuit to play, and this mandamus order was not a proper exercise of judicial power.

3. If this Court were to reverse the jurisdictional holding of the *Local Competition Decision*, it would follow *a fortiori* that the mandamus order should be vacated, because that order explicitly rests on the Eighth Circuit's earlier jurisdictional holding. For that reason, this Court should, at a minimum, hold this petition pending review of the *Local Competition Decision*. But, even if this Court were to affirm the Eighth Circuit's earlier jurisdictional holding, it would *not* follow that the mandamus order is valid, and this Court's review of that order would still be

needed. First, as discussed above, Section 271 squarely requires the Commission to interpret the pricing terms of Sections 251(c) and 252(d), and to address the public interest, for the limited purpose of adjudicating Bell Company applications to enter the long-distance market. That statutory mandate is not contingent upon the scope of the Commission's distinct authority to issue national guidelines directly governing interconnection agreements between any LEC and any carrier seeking entry into local markets. Second, and in any event, this Court's review of the *Local Competition Decision* could not cure the fatal jurisdictional defect in the Eighth Circuit's issuance of mandamus to review an order that Congress assigned to the exclusive province of the D.C. Circuit.

In sum, this Court's review of the *Local Competition Decision* will not necessarily resolve the independently certworthy question presented in this petition. We therefore urge the Court to grant this petition, permit the parties to file briefs on the question presented here, and consolidate its review of the mandamus order with its review of the *Local Competition Decision*. For several reasons, that course is preferable to holding this petition pending this Court's review of the rest of this case.

First, unlike most petitions that this Court holds pending disposition of other cases that it has agreed to review, this petition arises from an order *in the same case* as the petitions that this Court has already granted. It is only because the Eighth Circuit chose to wait for four months —until literally the day before the Conference at which this Court, as previously announced, considered our petition in No. 97-831 (see 118 S. Ct. 683 (1998))—that we could not include a challenge to the mandamus order in that petition. See 97-831 Pet. 11 n.4.

As a general matter, it would be uneconomical for this Court to review two related orders in the same case dur-

ing separate judicial Terms. That is particularly true in this case, because the mandamus order rests on the explicit premise that the scope of the Commission's Section 271 authority is inextricably related to the scope of its authority to issue general rules implementing Sections 251 and 252. Whether or not that premise is valid, review of the *Local Competition Decision* alone will inevitably require the Court to consider the relationship between those two aspects of this statutory scheme. For example, petitioner MCI has argued, and we agree, that the Commission's exclusive authority to make the findings necessary to adjudicate Section 271 applications strongly suggests that Congress intended for the Commission to issue rules implementing the pricing provisions of Sections 251 and 252. See 97-829 Pet. 14, 29; see also pp. 19-20, *supra*. Review of the mandamus order on the merits would thus require this Court to expend little additional effort.

Second, holding this petition pending resolution of the rest of this case could forestall the Court's review of the question presented here until October Term 1999, thereby perhaps postponing a decision on the merits until the year 2000. That delay would come at a time when the telecommunications industry needs more, not less, certainty about the complex of legal rights and responsibilities created by the 1996 Act. The volume of Section 271 applications is likely to increase during the next several years, and the issues presented here will be integral both to the Commission's compulsory 90-day adjudication of those applications and to the D.C. Circuit's subsequent review. Until this Court intervenes on the merits, parties aggrieved by the Commission's compliance with (and interpretation of) the mandamus order will predictably seek a variety of emergency remedies from the D.C. Circuit, perhaps from the Eighth Circuit, and ultimately from this Court, raising essentially the same issues presented here.

In our view, it would be preferable for this Court to resolve those issues sooner, in this general review proceeding, rather than later, in the context of piecemeal emergency litigation.

Finally, while mandamus is always an "extraordinary" remedy, *In re Sindram*, 498 U.S. at 179, this particular mandamus order is more extraordinary than most. The Eighth Circuit has entered a regulatory area that Congress specifically reserved for the expertise of another court, and, in so doing, it has thrown a complex statutory scheme into procedural disarray. That unprecedented and improper exercise of judicial power warrants this Court's prompt attention.

CONCLUSION

The petition for a writ of certiorari should be granted, and this Court should consolidate its review of the question presented in this petition with its review of the questions presented in the petitions for certiorari in No. 97-831 and related cases. In the alternative, the petition should be held pending review of this Court's decision in No. 97-831 and related cases.

Respectfully submitted.

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MARCH 1998

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321, 3406, 3410, 3414,
3416, 3418, 3424, 3430, 3436,
3444, 3450, 3453, 3460, 3507,
3519, 3520, 3603, 3608, 3696,
3708, 3709, 3756, 3901, 3906, 3982

IOWA UTILITIES BOARD, PETITIONER,
BELL ATLANTIC CORPORATION, ET AL.,
INTERVENORS ON APPEAL

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENTS

Filed: January 22, 1998

WRIT OF MANDAMUS

Before: BOWMAN, WOLLMAN, HANSEN, Circuit Judges.

To The Federal Communications Commission:

In accordance with the order of the United States Court of Appeals for the Eighth Circuit herein delivered, the Federal Communications Commission is hereby ordered to obey the Court's October 14, 1997,

mandate in Appeal No. 96-3321, *Iowa Utilities Board v. Federal Communications Commission.* The Federal Communications Commission is ordered to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271 as the Court's decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) requires. It is further ordered that the Federal Communications Commission cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d) of the Act. The Federal Communications Commission is ordered to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services.

It is so ordered.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 96-3321, 3406, 3410, 3414,
3416, 3418, 3424, 3430, 3436,
3444, 3450, 3453, 3460, 3507,
3519, 3520, 3603, 3608, 3696,
3708, 3709, 3756, 3901, 3906, 3982

IOWA UTILITIES BOARD, PETITIONER,
BELL ATLANTIC CORPORATION, ET AL.,
INTERVENORS ON APPEAL

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA, RESPONDENTS

Submitted: January 15, 1998
Filed: January 22, 1998

ORDER ON MOTIONS FOR
ENFORCEMENT OF THE MANDATE

Before: BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

I.

Several petitioners have filed motions requesting this court to issue and enforce our mandate in the case of *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th

Cir.1997).[1] On October 14, 1997, after granting motions for panel rehearing, we amended our July 18, 1997, decision and issued the mandate. *See id.* at 813 (replacing Section II(G)(1)(f)); *id.* at 818 n.38 (clarifying scope of vacatur); *id.* at 819 n. 39 (clarifying scope of vacatur). We expressly reserved jurisdiction over the petitioners' motions to enforce the mandate. Today, following oral argument on the motions, we address that issue.

One of the core holdings of our July 18, 1997, decision was that the Federal Communications Commission (FCC) has no jurisdiction to issue pricing regulations for interconnection, unbundled access, resale, and transport and termination of local telecommunication services under section 252(d) of the Telecommunications Act of 1996.[2] We held that the Act vests exclusive authority to establish the pricing requirements of this section in the state commissions, and we vacated the FCC's pricing regulations

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[1] Petitions for writs of certiorari have been filed and are currently pending before the Supreme Court. *See AT&T Corp. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 17, 1997) (No. 97-826); *MCI Telecomm. Corp. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 18, 1997) (No. 97-829); *Association for Local Telecomms. Servs. v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 18, 1997) (No. 97-830); *FCC v. Iowa Utils. Bd.*, 66 U.S.L.W. 3387 (U.S. Nov. 19, 1997) (No. 97-831); *Ameritech Corp. v. FCC*, 66 U.S.L.W. 3459 (U.S. Dec. 24, 1997) (No. 97-1075); *GTE Midwest Inc. v. FCC*, 66 U.S.L.W. 3459 (U.S. Dec. 30, 1997) (No. 97-1087); *US West Inc. v. FCC*, 66 U.S.L.W. 3459 (U.S. Jan. 5, 1998) (No. 97-1099); *Southern New England Tel. v. FCC*, —— U.S.L.W. —— (U.S. Jan. 8, 1998) (97-1141).

[2] The Telecommunications Act of 1996 (the Act) is codified in Volume 47 of the United States Code. We refer to it throughout by reference to the applicable section number. "Section 252(d)," for example, denotes 47 U.S.C. § 252(d).

in which the FCC purported to arrogate that power to itself. Today we hold that the FCC violated this central tenant of our decision when it issued its Ameritech Michigan Order of August 19, 1997.[3] Because that portion of the Ameritech Order which offends our decision is, in our view, an advisory opinion of the FCC, we need not review the FCC's denial of Ameritech's application or even determine whether we have jurisdiction to do so. Rather, Petitioners request and we grant prospective relief in the form of a writ of mandamus. Specifically, we direct the clerk of this court to issue a writ of mandamus ordering the FCC to abide by our mandate and to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies regarding the pricing of interconnection, unbundled access, resale, and transport and termination of local telecommunications traffic. For reasons which we explain, it has no authority to do so under section 271(d)(3)(A) or section 271(d)(3)(C) of the Act.

II.

A. The Mandate

In our July 18 decision, we held in the clearest possible terms that the state commissions have exclusive jurisdiction to regulate the prices that incum-

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[3] *See In re Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, FCC 97-298, 1997 WL 522784 (Aug. 19, 1997) (memorandum opinion and order denying application of Ameritech Michigan pursuant to section 271, as amended, to provide in-region, interLATA services in Michigan) (petitions for recon. pending) [hereinafter *Ameritech Order*].

bent local exchange carriers (LECs) may charge their competitors for access to the incumbent LECs' local telephone network facilities. After a detailed analysis of sections 251 and 252 of the Act, we concluded that "the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." *Iowa Utils. Bd.*, 120 F.3d at 796. Elsewhere we wrote that

> the terms of the Act clearly indicate that Congress did not intend for the FCC to issue any pricing rules, let alone preempt state-pricing rules regarding the local competition provisions of the Act. Because the Act clearly grants the states the authority to set the rates for interconnection, unbundled access, resale, and transport and termination of traffic, the FCC has no valid pricing authority over these areas of new localized competition for the states to negate. . . . [S]ubsections 252(c)(2) and 252(d) clearly assign jurisdiction over the rates for the local competition provisions of the Act to the state commissions[.]

Id. at 798-799 (internal citations omitted). In short, our decision made very clear that "Congress did not envision the FCC's participation in determining the prices that the incumbent LECs will be able to charge for opening their networks to new entrants." *Id.* at 795. We held that in promulgating regulations purporting to govern the types of pricing systems state commissions were to adopt, the FCC had exceeded its statutory authority and violated the plain meaning of the 1996 Federal Communications Act. Accordingly, we vacated the national pricing rules that the FCC had promulgated.

B. The FCC's Ameritech Order

We filed our *Iowa Utils. Bd.* decision on July 18, 1997. On August 19—scarcely one month later—the FCC made clear its intention to disregard those portions of our decision with which it disagreed. It did so in the memorandum opinion and order which it issued denying Ameritech Michigan's application to provide in-region interLATA services in Michigan. In that opinion, the FCC reasserted its authority to do precisely what we held in *Iowa Utils. Bd.* it had no power to do. It asserted that it had the authority to interpret section 252(d) of the Act, and it adopted a policy which will coerce state commissions to adopt its vacated TELRIC-based pricing rules for implementation of the local competition provisions of the Act in spite of our order.

The Ameritech Order denied Ameritech's application for authorization under section 271 of the Communications Act of 1934, as amended, to provide in-region, interLATA services in the State of Michigan. It denied the application because it found that Ameritech had failed to satisfy section 271's competitive checklist's requirements of access to its operations support systems, interconnection, and access to its 911 and E911 services. Finding these three failures to be dispositive, the FCC determined that it need not and would not address whether Ameritech had satisfied the other requirements of the competitive checklist. *See Ameritech Order* ¶¶ 5-6, 280-81. Specifically, it "[did] not reach the question of whether Ameritech's pricing of checklist items complies with the requirements of section 271[.]" *Id.* ¶ 281. Thus, paragraphs 280-297, wherein the FCC reasserts its authority to establish the prices for the local competi-

tion provisions, do not address the merits of Ameritech's application, but instead constitute an advisory opinion. The FCC explained its issuance of such an opinion by stating that it sought to provide guidance as to what showing would be required in future applications to demonstrate full compliance with the checklist. *Id.* ¶¶ 6, 281.

It is not for us to address the propriety of the FCC's issuance of an important policy statement in an advisory opinion separate from the merits determination of a section 271 order. Rather, our inquiry is limited to the question of whether the issuance of this particular advisory opinion and its content constitute a violation of our mandate. It clearly does. The FCC admits in paragraph 283 that "the Eighth Circuit has held that the Commission lacks jurisdiction to issue national rules establishing a methodology by which the states determine the rate for interconnection, unbundled network elements, resale, and transport and termination in state-arbitrated interconnection agreements pursuant to section 252." Inexplicably, it then proceeds to establish just such a methodology, stating that the cost-based standard of § 252(d) is contained in a federal statute and is "therefore[] presumed to have a uniform meaning nationwide." *Id.* ¶ 286. This attempt to reassert the vacated pricing rules by imposing them as conditions for entry by the Bell Operating Companies into the in-region, interLATA telecommunications business does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do. The FCC cannot do in an advisory opinion in a ruling on a section 271 application that which we have expressly forbidden it from

doing in its rule-making procedure. A more clear violation of our mandate could hardly be imagined.

C. Section 252

Section 271(d)(3) requires the FCC to determine whether an applicant has implemented the competitive checklist of Section 271(c)(2)(B). Items (i), (ii), (xiii), and (xiv) of that checklist in turn require a Bell Operating Company (BOC) to provide interconnection, access to unbundled network elements, transport and termination, and resale prices that are "in accordance with" subsections (c) and (d) of section 252.[4] In other words, items (i), (ii), (xiii), and (xiv) of

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[4] 47 U.S.C. § 271(c)(2)(B), the Competitive Checklist, provides in relevant part:

> Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.
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> * * *
>
> (xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.
>
> (xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

The FCC cites subsections (i), (ii), and (xiii) in support of its assertion of pricing authority. *See Ameritech Order* ¶¶ 292-93.

the competitive checklist do nothing more than incorporate by reference the specific requirements of sections 251 and 252. As discussed above, our July 18 decision clearly held that only the state commissions have the statutory authority to set prices under sections 251(c) and 252(d).

The FCC does not contest the fact that section 271(c)(2)(B) merely requires compliance with sections 251(c) and 252(d) of the Act, and it concedes that it "lack[s] authority to prescribe a national pricing methodology to implement the requirements of section 252(d)." *See id.* ¶ 284. Nonetheless, it engages in a lengthy discussion of its interpretation of section 252(d), *see id.* ¶¶ 282-294, and ends this discussion by concluding that subsections (i), (ii), and (xiii) of section 271(c)(2)(B) all require that the rates charged by the applicant BOC must be based on TELRIC principles. *Id.* ¶¶ 292-93. It clearly announces that it will not grant a section 271 application unless the rates are based on TELRIC principles. *Id.* In so doing, the FCC reinstates the substance of the pricing rules we vacated in our prior decision. In other words, in order to receive future FCC approval, a BOC will have to show that it prices its interconnection, unbundled access, resale, and transport and termination offerings under prices determined by the FCC's methodology. This violates our mandate. As discussed above, the very core of our holding was that the state commissions—not the FCC—have the exclusive authority to determine the pricing requirements of section 252(d).

We additionally discuss subsection (xiv) to clarify that nothing on the checklist could possibly be interpreted to grant such authority.

The FCC's justification for its reassertion of local pricing authority lacks even the scent of merit. It argues, in effect, that practical necessity requires it to violate the clear direction of this court. It writes:

> Because the Eighth Circuit concluded that the Commission lacked authority to prescribe a national pricing methodology to implement the requirements of section 252(d), if that decision stands, the meaning of section 252(d) ultimately will be determined through de novo review of state determinations by the federal district courts. The Act provides that parties aggrieved by state determinations under section 252 may sue in federal district court. Consequently, the district courts will review numerous interconnection agreements from some, if not all, of the states and the District of Columbia. The Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means. This litigation will take years, however, and inevitably will run the risk of impeding or significantly delaying the development of competition in the local exchange market, and, consequently, delaying the deregulation of the telecommunications markets that Congress envisioned.
>
> While the question of what constitutes cost-based pricing under section 252(d) wends it [sic] way through the courts, the Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard. The BOCs will file section 271 applications in the meantime, and the Com-

> mission is obligated by section 271 to issue a written determination approving or denying the authorization requested not later than 90 days after receiving an application.

Ameritech Order ¶¶ 284-85. The FCC uses this policy of expediency argument to justify its decision to flout this court's decision. However, the policy argument is both flawed and beside the point.

The FCC's policy argument is flawed because, counter to the assertion in paragraph 285 of the Ameritech Order, the FCC need not wait for the courts to review the state pricing regimes before it can apply them. Rather, the decisions of the state commissions are binding the moment they are issued. It is true that the pricing schemes established by the state commissions are appealable to the federal district courts by aggrieved parties, as Congress has directed. However, pending any such appeals, the pricing determinations of the state commissions constitute binding law. Thus, the parade of horribles described by the FCC will never arise. The FCC's role is, in fact, quite simple: It must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of the application. This can be done in part by simply asking the state commission whether the applicant BOC has complied with the state commission's pricing rules, as contemplated by section 271(d)(2)(B).[5] There will

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[5] The FCC is required to consult with the state commissions to verify the compliance of the BOCs with the checklist. *See* 47 U.S.C. § 271(d)(2)(B). We are not convinced by the FCC's argument that Congress intended section 271(d)(2)(B) to have no effect.

therefore be no occasion for the FCC to invent a requirement that pricing be done according to TELRIC principles. In fact, the FCC is expressly barred from limiting or extending the checklist "by rule or otherwise." *See* 47 U.S.C. § 271(d)(4).

The arguments advanced by the FCC are also beside the point. Notwithstanding its merits, a policy argument bottomed on an agency's view of expediency can never justify the agency's disregard of the existing mandate of a federal court in a case in which the agency was a party litigant. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). After a court has spoken, the FCC is bound to follow that court's mandate, because the FCC "is not a court nor is it equal to [a] court in matters of statutory interpretation." *Yellow Taxi Cab Co. of Minneapolis v. NLRB*, 721 F.2d 366, 382 (D.C. Cir. 1983). The FCC's disagreement with this court's decision is "simply an academic exercise that possesses no authoritative effect[,]" and in predicating its reassertion of pricing authority on its disagreement with this court's interpretation of section 252, the FCC "operate[s] outside the law." *International Bhd. of Elec. Workers, Local Union No. 474 v. NLRB*, 814 F.2d 697, 705 n.24 (D.C. Cir. 1987) (NLRB is bound by court's articulation of the law); *accord Taxi Cab Co. of Minnesota*, 721 F.2d at 382; *Ithaca College v. NLRB*, 623 F.2d 224, 228-29 (2d Cir.), *cert. denied*, 449 U.S. 975 (1980); *Allegheny Gen. Hosp. v. NLRB*, 608 F.2d 965, 970 (3d Cir. 1979), *abrogation on other grounds recognized, St. Margaret Mem'l Hosp. v. NLRB*, 991 F.2d 1146, 1152 (1993). The

FCC is free to ask (and indeed has asked)[6] the Supreme Court to reverse our decision, and it is free to ask the Congress to give it the authority to regulate the intrastate pricing of the local competition provisions we have said it does not now have. But in the absence of reversal or Congressional amendment, the FCC may not reassert its interpretation of section 252(d) or reassert its purported authority to mandate TELRIC pricing schemes for the local competition provisions when our order so clearly denies it that authority.[7]

The FCC's attempt to continue to exercise pricing authority through section 271 is reminiscent of its earlier attempt to do so through section 208. We rejected that attempt in our prior decision. *See* 120 F.3d at 804. As we noted in our prior opinion, section 2(b) of the Communications Act of 1934, 47 U.S.C. § 152(b), as construed by the Supreme Court in *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986), fences off intrastate matters from FCC regulation. *See Iowa Utils. Bd.*, 120 F.3d at 796-800. Where there is no unambiguous grant of intrastate authority to the FCC and the impossibility exception to section 2(b) does not apply, section 2(b) prevents "the FCC from intruding on the states' intrastate turf." 120 F.3d at 800. We held in our prior decision, and we reiterate today, that no section or subsection

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[6] *See* note 1.

[7] The FCC also argues that a uniform national pricing scheme would be easier to administer. *See Ameritech Order* ¶ 286. This additional expediency-based policy argument is similarly precluded by our clear mandate that, under the law, the state commissions have the exclusive authority to determine the price-setting mechanisms.

of the Telecommunications Act allows the FCC to break through that fence. We reject not only its attempt to utilize section 271(d)(3)(A), but also its attempt to utilize section 271(d)(3)(C) to accomplish this purpose. The FCC may not accomplish indirectly that which we have held it may not do directly.

D. Relief

The All Writs Act, 28 U.S.C. § 1651(a) (1994), gives federal courts the power to issue writs of mandamus. A federal court's power to utilize mandamus to enforce its prior mandate against an administrative agency is firmly established. *See City of Cleveland v. Federal Power Comm'n*, 561 F.2d 344, 346 (D.C. Cir. 1977) (directing Federal Power Commission to come into compliance with the court's prior mandate); *International Ladies' Garment Workers' Union v. Donovan*, 733 F.2d 920, 922-23 (D.C. Cir.) (remanding to district court for additional discovery and determination of whether Secretary of Labor's reimplementation of rules vacated by District of Columbia Circuit violated the mandate, and directing district court to issue writ of mandamus if Secretary's action did violate the mandate), *cert. denied*, 469 U.S. 820 (1984); *see also Oswald v. McGarr*, 620 F.2d 1190, 1196 (7th Cir. 1980) ("Mandamus is appropriate to review compliance with discretionary standards and nondiscretionary commands set forth in an earlier opinion concerning the parties."); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971) ("An appellate court likewise has continuing power to accept and pass upon a petition to clarify an outstanding mandate."), *cert. denied*, 406 U.S. 950 (1972). In *City*

of Cleveland, the District of Columbia Circuit explained:

> The decision of a federal appellate court establishes the law binding further action in the litigation by another body subject to its authority. The latter is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion of the court deciding the case, and the higher tribunal is amply armed to rectify any deviation through the process of mandamus. That approach, we have said, may appropriately be utilized to correct a misconception of the scope and effect of the appellate decision. These principles, so familiar in operation within the hierarchy of judicial benches, indulge no exception for reviews of administrative agencies.

561 F.2d at 346 (internal quotations, alterations, and footnotes omitted).

We have not only the power, but also a duty to enforce our prior mandate to prevent evasion. *See American Trucking Ass'ns, Inc. v. Interstate Commerce Comm'n*, 669 F.2d 957, 961 (5th Cir. 1982) ("Having the power, we also have the duty to clarify the mandate and to direct future compliance with it by mandamus."), *cert. denied*, 460 U.S. 1022 (1983). Failure to clarify the mandate and direct future compliance where mandamus is the only adequate remedy would "reward bureaucratic misconduct and encourage judicial anarchy." *Department of the Navy v. Federal Labor Relations Auth.*, 835 F.2d 921, 923 (1st Cir. 1987).

The mandate doctrine is a specific application of the doctrine of law of the case. Our mandate encompasses "everything decided, either expressly or by necessary implication." *City of Cleveland*, 561 F.2d at 348 (internal quotations omitted). A federal court of appeals can use mandamus to preclude an agency from taking steps to evade the effect of its mandate, even if these steps were not expressly contemplated by the prior decision. For example, in *MCI Telecomm. Corp. v. FCC*, 580 F.2d 590 (D.C. Cir.), *cert. denied*, 439 U.S. 980 (1978), the District of Columbia Circuit was asked to enforce its mandate against the FCC and AT&T. The court conceded that AT&T's position was not explicitly precluded by the language of the prior decision, *see id.* at 595, but nonetheless granted mandamus-type relief, because it found that the FCC position was "clearly inconsistent with the basic themes of our [] decision" and "deliberately frustrates the purpose of the litigation . . . and the intended effect of our decree." *Id.* at 597; *see also id.* at 595.

Respondents correctly point out that this court declines to grant mandamus relief unless there is "no other adequate alternative administrative or judicial remedy." *See In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986). In *American Trucking Ass'ns*, the Fifth Circuit clarified that a remedy is not "adequate," if it unduly burdens the aggrieved party. It noted that repeated litigation in "scores of cases" might eventually lead to resolution of the matter before it, but held that this alternative remedy was not adequate. *See* 669 F.2d at 961; *see also Department of the Navy*, 835 F.2d at 923 (requiring substantial relitigation of issues already decided would not constitute adequate alternative remedy).

The FCC's choice to promulgate its policy decision not in rules or regulations, but rather in an advisory opinion appended to a section 271 order was, in our view, clearly calculated so as to evade ordinary appellate review. We are concerned that the advisory nature of the portion which contradicts our mandate may render it unreviewable on direct appeal. We are also concerned by the fact that the offensive portion of the FCC's Order has, by its own terms, nothing to do with the actual denial of Ameritech's application—we suspect that this naked policy statement was added to the Ameritech Order in an attempt to forum-shop. Having lost in its bid to usurp the power to determine intrastate prices in the Eighth Circuit, the FCC now seeks to have another bite at the apple in the District of Columbia Circuit.

This is the type of "evasion" that necessitates mandamus relief. The FCC's advisory opinion is clearly calculated to have a chilling effect on the state commissions' employment of non-TELRIC pricing schemes, and to do so in a way that avoids our review. It is a plain-faced reassertion of section 252(d) pricing authority over the local competition provisions of the Act by the FCC in clear violation of our mandate, and it therefore triggers our inherent jurisdiction to enforce our mandate.

Respondents argue that we can take no action with regard to the Ameritech Order, because jurisdiction over section 271 disputes is given exclusively to the District of Columbia Circuit. Although we have noted that the offensive portion of the Ameritech Order was not used as a reason for denying Ameritech's section 271 application, we conclude that we do not need to reach this question. The FCC specifically

stated that it was not deciding whether Ameritech had satisfied the requirements of section 252(d). The FCC was simply using the advisory portion of its order as a vehicle by which it could intimidate state commissions into complying with the substance of the rules we vacated in our July 18 decision. If this intimidation tactic is successful, a case or controversy will never arise to challenge its validity, because all states will be forced to adopt the FCC determined pricing schemes. The harm we wish to address is therefore entirely prospective: we seek to assure state commissions that the pricing authority granted to them under section 252 is not eviscerated. Since the harm we seek to remedy is entirely prospective, we believe that a forward-looking remedy will suffice.

We therefore leave the FCC's Ameritech Order untouched. However, we grant mandamus to enforce our mandate in order to disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated in paragraphs 280-297 of the Order.[8] We order the FCC to apply section 252(d)

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[8] The remedy we grant today is not unlike the remedy granted by the Fifth Circuit in *American Trucking Ass'ns*, 669 F.2d at 957. There the court issued mandamus in response to the Interstate Commerce Commission's (ICC's) continued application of a rule the Fifth Circuit had found to be invalid. There, as here, the agency had regulated beyond the scope of its statutory authority. Like the FCC in the case at hand, the ICC continued to impose the substance of the rule in various separate individual administrative adjudications, notwithstanding the mandate of the court of appeals. The Fifth Circuit granted petitioners' request that it issue a writ of mandamus ordering the ICC to "comply in all pending actions before it with the full scope of this Court's opinion." *Id.* at 960 (internal quotes omitted).

in the context of section 271 as our *Iowa Utils. Bd.* decision requires. In other words, we order the FCC to cease and desist from attempting to give effect to its interpretation of the substantive requirements of section 252(d). We order the FCC to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, inter-LATA services. The FCC has no authority under section 271(d)(3)(A) or section 271(d)(3)(C) to issue rules, regulations, orders, policy statements, or any other genre of opinions regarding how the local competition provisions of the Act involving interconnection, unbundled access, resale, or transport and termination of traffic should be priced.

The motions to enforce the mandate are granted.

A true copy.

Attest.

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

Excerpts from: *In The Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137 (FCC 1997):

F. Additional Concerns

280. Because we find that Ameritech has not demonstrated that it has fully implemented the competitive checklist with respect to OSS, interconnection, and 911 and E911 services, we need not decide in this Order whether Ameritech is providing the remaining checklist items.[734] Still, as stated above, in order to provide further guidance with respect to Ameritech's checklist compliance, we address here our concerns regarding certain other checklist items. We reiterate that we make no findings with respect to Ameritech's compliance with those items discussed herein.

1. Pricing of Checklist Items

281. We do not reach the question of whether Ameritech's pricing of checklist items complies with the requirements of section 271 given our findings

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[734] We note that Ameritech's compliance with section 271(c)(2)(B)(ii), its duty to provide nondiscriminatory access to unbundled network elements in accordance with sections 251(c)(3) and 252(d)(1), and section 271(c)(2)(B)(xiv), its duty to provide resale in accordance with sections 251(c)(4) and 252(d)(3), is discussed in the OSS section above. *See supra* Section VI.C. As we also discuss in that section, we have concerns about Ameritech's compliance with section 271(c)(2)(B)(iv), its duty to provide unbundled local loops. *See supra* para. 219.

above concerning Ameritech's failure to comply with the checklist on other grounds. Nonetheless, given that efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items, we believe it important to discuss our general concerns about pricing. Our hope is that this discussion will help expedite Ameritech's entry into long distance in Michigan and the entry of the other BOCs into the in-region interLATA market by providing more guidance as to what showing is required in future applications to demonstrate full compliance with the checklist. We hope that Ameritech will demonstrate compliance with the principles set forth below in its next application, and we urge the Department of Justice and the state commission to address Ameritech's showing on pricing of checklist items in the future.

282. Section 271(d) requires the Commission to determine that Ameritech has fully implemented the competitive checklist. The competitive checklist, in turn, requires the BOC to provide interconnection, access to unbundled network elements, transport and termination, and resale at prices that are "in accordance with" section 252(d).[735] Section 252(d) provides that rates for interconnection, unbundled network elements, and transport and termination must be cost-based.[736] Specifically as to interconnection and

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[735] 47 U.S.C. §§ 271(c)(2)(B)(i), (ii), (xiii), (xiv).

[736] *Id.* §§ 252(d)(1) ("Determination by a State commission of the just and reasonable rates" for interconnection and unbundled network elements "shall be . . . based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element . . ."); 252(d)(2) ("a State commission shall

unbundled network elements, section 252(d) provides that rates must be "based on the cost . . . of providing the interconnection or network element . . . and may include a reasonable profit."[737] Section 252(d)(3) provides that the price for resold service pursuant to section 251(c)(4) shall be based on "retail rates . . . excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[738] The Act vests in the Commission the exclusive responsibility for determining whether a BOC has in fact complied with the competitive checklist.[739] In so doing, we must assess whether a BOC has priced interconnection, unbundled network elements, transport and termination, and resale in accordance with the pricing requirements set forth in section 252(d) and, therefore, whether the BOC has fully implemented the competitive checklist.

283. We recognize that the Eighth Circuit has held that the Commission lacks jurisdiction to issue national rules establishing a methodology by which

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not consider the terms and conditions for reciprocal compensation to be just and reasonable unless . . . such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and . . . such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls").

[737] *Id.* § 252(d)(1).

[738] *Id.* § 252(d)(3).

[739] In making this determination, we are required to consult with the relevant state commission and the Department of Justice. *Id.* § 271(d)(2).

the states determine the rates for interconnection, unbundled network elements, resale, and transport and termination in state-arbitrated interconnection agreements pursuant to section 252.[740] The court, however, addressed the challenge to the Commission's pricing rules on jurisdictional grounds and expressly did not address the substantive merits of the Commission's rules. The court, therefore, made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based.

284. Because the Eighth Circuit concluded that the Commission lacked authority to prescribe a national pricing methodology to implement the requirements of section 252(d), if that decision stands, the meaning of section 252(d) ultimately will be determined through *de novo* review of state determinations by the federal district courts. The Act provides that parties aggrieved by state determinations under section 252 may sue in federal district court.[741] Consequently, the district courts will review numerous interconnection agreements from some, if not all, of the states and the District of Columbia.[742] The

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740 *Iowa Utils. Bd.* 1997 WL 403401.

741 *See* 47 U.S.C. § 252(e)(6) ("In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section").

742 *See e.g., US WEST* v. *Jennings, et al.*, Civ. Nos. 97-0026, 97-0027 (D. Ariz. filed Jan. 7, 1997) (challenging, *inter alia*, Arizona commission's resale and transport and termination pricing determinations); *GTE v. Conlon, et al.*, Civ. No. 97-0061 (E.D. Cal. filed Jan. 31, 1997) (challenging, *inter alia*,

Courts of Appeals and, perhaps ultimately, the Supreme Court, will resolve the issue of what the statutory requirement that rates be cost-based means. This litigation will take years, however, and inevitably will run the risk of impeding or significantly delaying the development of competition in the local exchange market, and, consequently, delaying the deregulation of the telecommunications markets that Congress envisioned.

California commission's use of forward looking cost methodology); *AT&T v. BellSouth, et al.*, Civ. No. 97-130 (N.D. Fla. filed April 18, 1997) (alleging, *inter alia*, state commission erred in not deaveraging prices for unbundled network elements); *AT&T v. U S WEST, et al.*, Civ. 97-917 (D. Minn. filed April 16, 1997) (same); *Southwestern Bell Telephone Col. v. McKee, et al.*,Civ. No. 97-2197 (D. Kan. filed April 11, 1997) (challenging, *inter alia*, state commission's resale price discount); *Southwestern Bell Telephone v. Zobrist, et al.*, Civ. No. 97-0140 (W.D. Mo. filed Feb. 6, 1997) (alleging, *inter alia*, state commission improperly relied on TELRIC methodology); *MCI Telecommunications Corp. v. Southwestern Bell Telephone Co., et al.*, Civ. No. 97-132 (W.D. Tex. filed Feb. 28, 1997) (alleging, *inter alia*, state commission erred in not using forward looking cost methodology). GTE has filed suits in numerous states, including Michigan, alleging, *inter alia*, that the rates established by state commissions in arbitrations for unbundled network elements and interconnection improperly preclude GTE from recovering historical costs. *See, e.g., GTE v. Strand, et al.*, Civ. No. 97-20 (W.D. Mich. filed Feb 25, 1997); *GTE v. Johnson et al.*, Civ. No. 4:97CV26 (N.D. Fla. filed Jan. 31, 1997); *GTE v. Naito, et al.*, Civ. No. 97-00162 (D. Haw. filed Feb. 14, 1997); *GTE v. Miller, et al.*, Civ. No. 96-1584 (C.D. Ill. filed Dec. 19, 1996); *GTE v. Mortell, et al.*, Civ. No. 97-0066 (N.D. Ind. filed Feb. 20, 1997); *GTE v. Breathitt, et al.*, Civ. No. 97-7 (E.D. Ky. filed Jan. 29, 1997); *GTE v. Zobrist, et al.*, Civ. No. 97-0193 (W.D. Mo. filed Feb. 19, 1997).

285. While the question of what constitutes cost-based pricing under section 252(d) wends it[s] way through the courts, the Commission, pursuant to section 271, must determine whether the BOCs have fully implemented the competitive checklist, which incorporates the section 252(d) cost-based standard. The BOCs will file section 271 applications in the meantime, and the Commission is obligated by section 271 to issue a written determination approving or denying the authorization requested not later than 90 days after receiving an application.[743]

286. The cost-based standard is contained in a federal statute. It is, therefore, presumed to have a uniform meaning nationwide.[744] As the Supreme Court has often stated, "federal statutes are generally intended to have uniform nationwide application."[745] Moreover, there is nothing in section 271 to suggest that the Commission's bases for determining

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[743] 47 U.S.C. § 271(d)(3).

[744] *See, e.g., U.S. v. Phipps*, 68 F.3d 159, 161 (7th Cir. 1995) ("Language in federal statutes and regulations usually has one meaning throughout the country").

[745] *See, e.g., Mississippi Bank of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (citations omitted); *see also Jerome v. United States*, 318 U.S. 101, 104 (1943). Occasionally, the federal courts have concluded that an ambiguous federal statutory term was to be given meaning by reference to state law. *See, e.g., DeSylva v. Ballentine*, 351 U.S. 570 (1956); *Reconstruction Finance Corp. v. Beaver County*, 328 U.S. 204 (1946). But that approach has been applied only in cases in which the ambiguous federal statutory term is a familiar state law term with a history of state law jurisprudence interpreting it. Indeed, it is only in such cases that the issue of national uniformity is even raised; in all other cases involving ambiguous federal statutory terms, national uniformity is simply taken for granted. The general rule plainly applies here.

checklist compliance should be vary throughout the country. The Commission, pursuant to its responsibility under section 271, therefore must apply uniform principles to give content to the cost-based standard in the competitive checklist for each state-by-state section 271 application.

287. Such a reading of our responsibilities under section 271 is also sound policy. Determining cost-based rates has profound implications for the advent of competition in the local markets and for competition in the long distance market. Because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit efficient entry. That would be the case, for example, if such prices included embedded costs. Moreover, allowing a BOC into the in-region inter-LATA market in one of its states when that BOC is charging noncompetitive prices for interconnection or unbundled network elements in that state could give that BOC an unfair advantage in the provision of long distance or bundled services.

288. We believe that Congress did not intend us to be so constrained in conducting our prescribed assessment of checklist compliance in section 271. We conclude that Congress must have intended the Commission, in addressing section 271 applications, to construe the statute and apply a uniform approach to the phrase "based on cost" when assessing BOC compliance with the competitive checklist. We will consider carefully the state commission's assessment of pricing contained in its checklist compliance verification, the methodology used to derive prices for

checklist items, and the allegations of interested parties in the section 271 proceeding. It is our understanding that a large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches. Our ultimate objective, for the purpose of section 271 compliance, is to determine whether the BOC's prices for checklist items in fact meet the relevant statutory requirements. We note, moreover, that even if it were decided that we lacked authority to review BOC prices as an aspect of our assessment of checklist compliance under section 271(d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C). We discuss below our conclusions concerning the appropriate pricing for these checklist items.

289. *TELRIC-Based Pricing of Interconnection Services, Unbundled Network Elements, and Transport and Termination.* In ascertaining whether a BOC has complied with the competitive checklist regarding pricing for interconnection, unbundled network elements, and transport and termination pursuant to section 251, it is critical that prices for these inputs be set at levels that encourage efficient market entry. New entrants should make their decisions whether to purchase unbundled elements or to construct facilities based on the relative economic costs of these options. New entrants cannot make such decisions efficiently unless prices for unbundled elements are based on forward-looking economic costs. Similarly, prices for interconnection and transport and termination must be based on forward-looking economic costs in order to encourage efficient entry. In order for competition to drive retail prices

to cost-based levels, as occurs in efficient, competitive markets, new entrants must be able to purchase interconnection services, unbundled network elements, and transport and termination at rates that reflect forward-looking costs. Adopting a pricing methodology based on forward-looking costs best replicates, to the extent possible, the conditions of a competitive market. In addition, a forward-looking cost methodology reduces the ability of an incumbent to engage in anticompetitive behavior, permits new entrants to take advantage of the incumbent's economies of scale, scope, and density, and encourages efficient market entry and investment by new entrants. We conclude, therefore, that a BOC cannot be deemed in compliance with sections 271(c)(2)(B)(i), (ii), and (xiii) of the competitive checklist unless the BOC demonstrates that prices for interconnection required by section 251, unbundled network elements, and transport and termination are based on forward-looking economic costs.

290. We have previously set forth our view that the requirement for the use of foward-looking economic costs is to be implemented through a method based on total element long-run incremental cost or TELRIC. TELRIC principles ensure that the prices for interconnection and unbundled network elements promote efficient entry decisions. Pursuant to TELRIC principles, prices for interconnection and unbundled network elements recover the forward-looking costs over the long run directly attributable to the specified element, as well as a reasonable allocation of forward-looking common costs.[746] TELRIC

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[746] Section 252(d)(2) states that reciprocal compensation rates for transport and termination shall be based on "a rea-

pricing also specifically provides for a reasonable profit.[747] We conclude that, for purposes of checklist compliance, prices for interconnection and unbundled network elements must be based on TELRIC principles. We emphasize, however, that it is not the label that is critical in making our assessment of checklist compliance, but rather what is important is that the prices reflect TELRIC principles and result in fact in reasonable, procompetitive prices. It is our understanding that the large majority of state commissions have stated that they have adopted or intend to adopt forward-looking economic cost approaches. For instance, the principles that the Michigan PSC applied in its recent decision on permanent prices for interconnection appear to be fully consistent with TELRIC principles.[748]

291. We recognize that use of TELRIC principles will necessarily result in varying prices from state to state because the parameters of TELRIC may vary from state to state. Costs may vary, for example, due to differences in terrain, population density, and labor

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sonable approximation of the additional costs of terminating such calls." 47 U.S.C. § 252(d)(2)(A)(ii). The determination of "additional costs" of transport and termination must also be based on TELRIC principles.

[747] TELRIC includes what is called "normal" profit, which is the total revenue required to cover all of the costs of a firm, including its opportunity costs. The concept of normal profit is embodied in forward-looking costs because the forward-looking costs of capital, that is, the cost of obtaining debt and equity financing, is one of the forward-looking costs of providing the network elements. This forward-looking cost of capital is equal to a normal profit.

[748] *See Michigan Rate Proceeding. See also, supra* note 152.

costs from one state to the next. TELRIC principles will not generate the same price in every state; indeed it will not even generate the same formula for pricing in every state. But such principles are fair and procompetitive and should create even opportunities for entry in every state, while permitting, indeed obliging, each state commission to determine prices on its own.[749] In order for us to conduct our review, we expect a BOC to include in its application detailed information concerning how unbundled network element prices were derived.

292. Establishing prices based on TELRIC is a necessary, but not sufficient, condition for checklist compliance. In order for us to conclude that sections 271(c)(2)(B)(i) and (ii) are met, rates based on TELRIC principles for interconnection and unbundled network elements must also be geographically deaveraged to account for the different costs of building and maintaining networks in different geographic areas of varying population density. Deaveraged rates more closely reflect the actual costs of providing interconnection and unbundled elements. Deaveraging should, therefore, lead to increased competition and ensure that competitors make efficient

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[749] We note that Ameritech states that its arbitrated rates for unbundled network elements, interconnection, local transport and termination, and collocation, "are, in fact, lower than a conservative estimate of forward-looking economic costs determined in accordance with the Commission's now-stayed pricing rules." *See* Ameritech Application at 35 n.37. As we previously indicated, we urge the Michigan Commission and the Department of Justice to address Ameritech's compliance with TELRIC principles when Ameritech refiles its application.

entry decisions about whether they will use unbundled network elements or build facilities.

293. There also must be "just and reasonable" reciprocal compensation for the transport and termination of calls between an incumbent's and a new entrant's network.[750] In order for us to find that the statutory standard has been met for section 271(c)(2)(B)(xiii), the rates not only must be based on TELRIC principles, but new entrants and BOCs must also each be compensated for use of the other's network for transport and termination.

294. Finally, we believe that it is important to our assessment of checklist compliance to know the basis for the prices submitted by the BOC in the application. In particular, we would want to know whether those prices were based on completed cost studies, as opposed to interim prices adopted pending the completion of such studies.

295. *Pricing for Resold Services.* We conclude that a BOC cannot demonstrate compliance with the competitive checklist unless it has appropriate rates for resale services, which the Act defines as "wholesale rates [based on] retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[751] Accordingly, resellers should not be required to compensate a BOC for the cost of services, such as marketing, that resellers perform. Moreover, just as recurring wholesale rates should not reflect reasona-

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750 *See* 47 U.S.C. § 252(d)(2).

751 *Id.* § 252(d)(3).

bly avoidable costs, neither should non-recurring charges associated with the service being resold reflect costs that would be reasonably avoidable if the BOC were no longer to offer the service on a retail basis. We will not consider a BOC to be in compliance with section 271(c)(2)(B)(xiv) of the competitive checklist unless the BOC demonstrates that its recurring and non-recurring rates for resold services are set at the retail rates less the portion attributable to reasonably avoidable costs.

296. *Non-recurring Charges.* Unreasonably high non-recurring charges for unbundled loops and other essential inputs can have as much of a chilling effect on local competition as unreasonably high recurring fees. Both types of charges must be cost-based in order for local competition to take root and flourish. Non-recurring charges may be assessed in the provision of unbundled network elements and interconnection (in providing collocation, for example), and in the provision of resale. Consequently, we conclude that a BOC will not be deemed in compliance with sections 271(c)(2)(B)(i),(ii) and (xiv) of the competitive checklist unless it has shown that its non-recurring charges reflect forward-looking economic costs.[752]

297. *Continuing Compliance.* We must be confident that a BOC will continue to comply with the

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[752] With regard to non-recurring charges associated with services made available for resale, charges that have a retail eqivalent are to be priced based on the avoided cost standard in section 252(d)(2) as discussed in the preceding paragraph. Non-recurring charges associated with resale that have no retail equivalent, *e.g.*, development of billing systems for resellers, however, should be based on forward-looking economic costs as discussed in this paragraph.

pricing requirements contained in the competitive checklist after it has been authorized to provide in-region interLATA service. We anticipate, therefore, that it may be necessary to require, as a condition of authorization, that the BOC continue to price interconnection, unbundled network elements, transport and termination, and resold services in accordance with the competitive checklist as we have described above if it wishes to remain in the long distance market. Imposition of such conditions may be particularly important where we anticipate continuing negotiations with individual carriers over pricing terms and conditions such as non-recurring charges. We believe that we have authority to impose such conditions pursuant to sections 271(d)(6) and 303(r) of the Communications Act.[753]

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[753] 47 U.S.C. §§ 271(d)(6), 303(r); *see also infra*, Section IX (discussing the Commission's authority to impose conditions).

APPENDIX C

Section 271 of the Communications Act of 1934, 47 U.S.C. 271, provides:

BELL OPERATING COMPANY ENTRY INTO INTERLATA SERVICES.

(a) GENERAL LIMITATION.—Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA SERVICES TO WHICH THIS SECTION APPLIES.—

(1) IN-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) OUT-OF-REGION SERVICES.—A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) INCIDENTAL InterLATA SERVICES.—A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) TERMINATION.—Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) REQUIREMENTS FOR PROVIDING CERTAIN IN-REGION interLATA SERVICES.—

(1) AGREEMENT OR STATEMENT.—A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR.—A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this

subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) FAILURE TO REQUEST ACCESS.—A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) SPECIFIC INTERCONNECTION REQUIREMENTS.—

(A) AGREEMENT REQUIRED.—A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) COMPETITIVE CHECKLIST.—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell

operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to—

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service cus-

tomers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) ADMINISTRATIVE PROVISIONS.—

(1) APPLICATION TO COMMISSION.—On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for

authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) CONSULTATION.—

(A) CONSULTATION WITH THE ATTORNEY GENERAL.—The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) CONSULTATION WITH STATE COMMISSIONS.—Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) DETERMINATION.—Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) LIMITATION ON COMMISSION.—The Commission may not, by rule or otherwise, limit or extend

the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) PUBLICATION.—Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) ENFORCEMENT OF CONDITIONS.—

(A) COMMISSION AUTHORITY.—If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) RECEIPT AND REVIEW OF COMPLAINTS.—The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) LIMITATIONS.—

(1) JOINT MARKETING OF LOCAL AND LONG DISTANCE SERVICES.—Until a Bell operating company is authorized pursuant to subsection (d)

of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA TOLL DIALING PARITY.—

(A) PROVISION REQUIRED.—A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) LIMITATION.—Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) EXCEPTION FOR PREVIOUSLY AUTHORIZED ACTIVITIES.—Neither subsection (a) of this

section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) DEFINITION OF INCIDENTAL InterLATA SERVICES.—For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) LIMITATIONS.—The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this sec-

tion by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) ADDITIONAL DEFINITIONS.—As used in this section—

(1) IN-REGION STATE.—The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) AUDIO PROGRAMMING SERVICES.—The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) VIDEO PROGRAMMING SERVICES; OTHER PROGRAMMING SERVICES.—The terms "video programming service" and "other programming services" have the same meanings as such terms have under section 522 of this title.

(j) CERTAIN SERVICE APPLICATIONS TREATED AS IN-REGION SERVICE APPLICATIONS.—For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.

APPENDIX D

Section 402 of the Communications Act of 1934, 47 U.S.C. 402 (Supp. II 1996), provides, in pertinent part:

(a) Procedure

Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission under this chapter (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.

(b) Right to appeal

Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved or whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1) to (4) and (9) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

(9) By any applicant for authority to provide interLATA services under section 271 of this title whose application is denied by the Commission.

Supreme Court, U. S.
FILED
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Nos. 97-1519, 97-1520

In The

Supreme Court of the United States

October Term, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

AT&T CORP., et al.,

Petitioners,

v.

IOWA UTILITIES BOARD, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Eighth Circuit was correct in enforcing its mandate and in ordering the Federal Communications Commission (FCC) to apply section 252(d) of the Telecommunications Act of 1996 in the context of section 271, as the Court's decision in *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (1997) requires?

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MISCELLANEOUS

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Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-298, FCC No. 97-298 (Aug. 19, 1997) 2, 3, 4, 6

16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* (2d ed. 1996) 9

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Supreme Court Rule 10(b) 9

STATEMENT OF THE CASE

The Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (the Act) was designed to encourage competition in the local telephone industry by requiring the local exchange carriers to provide competitors access to their facilities. The Act gave state regulatory commissions the authority to set prices for such access. 47 U.S.C. section 252(c)(2).[1] Section 252(d) lists the pricing standards that state commissions must apply to determine appropriate rates. 47 U.S.C. section 252(d)(1)(A)(i).

Following the signing of the Act, the FCC adopted extensive pricing regulations for interconnection, unbundled access, resale and transport and termination of local telecommunications services. *First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First R&O)*, 11 F.C.C.R. 15499 (1996). In particular, the FCC regulations required state commissions to employ the "total element long run incremental cost" (TELRIC) method for determining the rates "based on the cost" required by section 252(d)(1)(A)(i). *First R & O* at ¶ 672. Twenty-eight states and the National Association of Regulatory Utility Commissioners sought review and relief from these pricing regulations.

In its July 18, 1997, opinion reviewing the FCC's regulations, the Eighth Circuit Court of Appeals

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[1] In addition, Section 2(b) of the 1934 Communications Act, 47 U.S.C. § 152 (b), continued to prohibit the FCC from regulating intrastate ratemaking matters reserved to the states.

concluded "that the FCC exceeded its jurisdiction in promulgating the pricing rules."[2] 120 F.3d at 794. It concluded "that the Act plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." 120 F.3d at 796. The Court further determined the FCC could not use its review or enforcement authority under 47 U.S.C. section 208 to review and redetermine state commission determinations of the just and reasonable rates that incumbent local exchange carriers can charge their competitors. 120 F.3d at 804. To do so would "undermine" the jurisdictional decision. *Id.*

Scarcely one month after the Eighth Circuit issued its ruling, the FCC attempted to utilize its authority under section 271 to evade the jurisdictional ruling. The FCC conditioned entry of the Bell Operating Companies (BOCs) into the long distance market on compliance with the FCC-mandated pricing method recently vacated as beyond the FCC's jurisdiction by the Eighth Circuit. *Application of Ameritech Michigan Pursuant to Section 217 of the Communications Act of 1934, as amended, To Provide In-Region InterLATA Services in Michigan (Ameritech Order)*, CC Docket No. 97-298, FCC No. 97-298 (Aug. 19, 1997). Pet. App. 21a-32a.[3] Section 271 grants the FCC the

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[2] Petitions for certiorari of this decision, as well as the Court's decision reviewing the Second Report and Order were granted on January 23, 1998.

[3] "Pet. App." refers to the appendix to the petition for a writ of certiorari in *Federal Communications Commission, et al. v. Iowa Utilities Board, et al., No. 97-1519.*

authority to approve entry by the BOCs into the interLATA long distance market.[4] To enter, the FCC must find the BOC meets a 14-point "competitive checklist" created by section 271(c)(2)(B) and entrance must be consistent with the public interest. Included in the "checklist" is the requirement that BOCs demonstrate interconnection and access in accordance with sections 251(c)(2) and (3) and 252(d)(1).[5]

In denying Ameritech's application for interLATA entry in the state of Michigan, the FCC took the opportunity to provide guidance concerning the public interest standard that it would apply in evaluating future section 271 applications. *Ameritech Order* at ¶ 6. In this ostensibly advisory portion of the order, the FCC stated that for a BOC to show it has made available "interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)," the first checklist requirement,[6] the BOC must demonstrate use of the FCC's version of the TELRIC pricing methodology. Pet. App. 28a. The FCC also stated that as a condition of authorization it would require continuing compliance with the TELRIC pricing requirements to provide in-region interLATA services. Pet. App. 33a-34a.

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[4] After consultation with the states and the Department of Justice, the FCC may approve entry if the BOC has met certain conditions designed to ensure a competitive environment exists in a state. *See* 47 U.S.C. § 271(c)(2)(B).

[5] Section 252(d)(1) contains the pricing standard to be applied by State commissions in determining just and reasonable rates for interconnection.

[6] Section 271(c)(2)(B)(i); 47 U.S.C. § 271(c)(2)(B)(i).

Several parties, including the State Commission Respondents and NARUC, filed motions requesting the Eighth Circuit to issue and enforce the mandate in the case of *Iowa Utilities Board v. FCC*, 120 F.3d 753 (8th Cir. 1997). These parties claimed the requirement of TELRIC pricing as a condition precedent to BOC entry was tantamount to reestablishing pricing standards contrary to the Eighth Circuit's ruling. On January 22, 1998, the Eighth Circuit held the FCC violated the central tenet of the Court's ruling when it issued its *Ameritech Order* of August 19, 1997. Pet. App. 5a. The Eighth Circuit reiterated its decision that the state commissions have exclusive jurisdiction to regulate prices and rejected the FCC's reassertion of local pricing authority under section 271, finding it lacked "even the scent of merit." Pet. App. 11a. It directed the clerk to issue a writ of mandamus ordering the FCC to abide by the mandate and to refrain from subsequent attempts to apply either directly or indirectly its vacated pricing policies regarding the pricing of interconnection, unbundled access, resale, and transport and termination of local telecommunications traffic. Pet. App. 5a; 1a-2a.

In March, 1998, the FCC and AT&T filed petitions for a writ of certiorari requesting this Court to consolidate review of the question presented in these petitions with its review of the questions presented in the petitions for certiorari in No. 97-826 and related cases.

REASONS FOR HOLDING THE PETITIONS

The State Commission Respondents and NARUC request that the Court hold the petitions pending review of the Eighth Circuit's decisions in No. 97-826 and related cases.[7] If this Court reverses the Eighth Circuit's jurisdictional decision, the reversal will require the writ of mandamus to be vacated. Affirmance of the Eighth Circuit jurisdictional ruling on pricing will require denial of the petitions for certiorari. Therefore, there is no need to consolidate the review of the questions presented in this petition with the review of the questions presented in the petitions for certiorari in No. 97-826 and related cases.

1. If the Court reverses the Eighth Circuit's jurisdictional ruling, the FCC will have the direct authority under sections 251 and 252 to define pricing. In that case, the Court will be required to grant the petitions and vacate the writ of mandamus, which rests on the Eighth Circuit's jurisdictional holding that Congress vested pricing authority with the states. The case would then be remanded for dismissal as moot.

2. If the Court affirms state authority to define pricing under section 252(d), then those decisions must be given effect in interpreting section 271(c)(2)(B)(i), which incorporates section 252(d)(1). It is the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning. *See, e.g., C.I.R. v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993), *on remand*, 1 F.3d 287 (5th Cir. 1993). Section 271 incorporates by reference the pricing

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[7] The FCC presented this disposition as an alternative in its petition. FCC Pet. at. p. 30.

standards which the states are granted exclusive authority to interpret under section 252(d). Once it is determined that states have exclusive authority over pricing under section 252(d), subject to federal district court review,[8] then that authority must be recognized in construing section 271. Acts of Congress should not be read as a series of unrelated and isolated provisions. *See Gustafson v. Alloyd Co. Inc.*, 513 U.S. 570 (1995), *on remand*, 53 F.3d 1078 (7th Cir. 1995). Here, section 271 and 252(d) must be construed together respecting state power over interconnection pricing (section 252(d)) by requiring deference to state exercise of pricing authority in section 271 proceedings.

3. It is also an elementary canon of construction that a statute should be interpreted so as not to render one part inoperative. *See Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 248 (1985). The FCC's assertion of independent authority to define pricing standards for BOC entry could leave state commission pricing determinations, including those favorably reviewed by federal districts courts, without practical effect, in contravention of this basic rule of statutory construction. The FCC stated in its *Ameritech Order* that a BOC could not comply with the first checklist item if prices were determined using a methodology other than TELRIC. Pet. App. 29a-30a. If a state commission adopted prices under

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[8] State commission actions are reviewable by an appropriate Federal district court to determine whether the agreement or statement meets the requirements of sections 251 and 252. *See* 47 U.S.C. 252(e)(6).

sections 251 and 252 applying a methodology that differed from the TELRIC methodology required by the FCC for checklist compliance, a BOC would be precluded *ab initio* from entering the interLATA market. This outright prohibition on entry would lead to impasse between federal and state jurisdictions because a BOC would be faced with conflicting requirements on interconnection pricing in violation of the clear intent of section 271. The Eighth Circuit aptly described the TELRIC requirement as "clearly calculated to have a chilling effect on the state commissions' employment of non-TELRIC pricing schemes." Pet. App. 18a. Because the BOCs control roughly 80 percent of all access lines in the United States, the final outcome of this "intimidation tactic" would be to force states to adopt the FCC pricing standards or forego interLATA competition in their states.[9] *Id.* If the right to set prices is vested with the states, the FCC cannot extend its authority under the competitive checklist to undermine that jurisdiction. To allow this result would render state authority and the jurisdictional decision of the Eighth Circuit meaningless for four-fifths of the nation's telephone customers.

The FCC retains all requisite authority to review the competitive situation in each state and to make the ultimate decision to grant or deny BOC entry as envisioned by the Act. BOC entry should be dependent on a finding the local market is open to competition, not on an illegal

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[9] Because there is a continuing compliance requirement, states would be required to completely relinquish their pricing authority in order for BOCs to retain interLATA authority.

extension of the competitive checklist to require application of the FCC's pricing methodology.[10] The FCC's interpretation of its authority is not a necessary construction to discharge its duty under section 271.

4. The FCC contends that the mandamus order should be vacated because the Eighth Circuit lacked jurisdiction to consider issues arising under section 271.[11] The Eighth Circuit did not review the FCC's basis for denying the Ameritech 271 application, rather it properly left "the Ameritech Order untouched." Pet. App. 19a. The Eighth Circuit precluded the FCC from "using the advisory portion of its order as a vehicle by which it could intimidate state commissions. . . . " Pet. App. 19a. Since the pricing portion of the order was advisory, there has been no interference with the jurisdiction of the D.C. Circuit. Instead, the Eighth Circuit appropriately acted to protect its own jurisdiction to construe section 252(d) in the face of a deliberate FCC attempt to evade that decision by imposing its favored pricing methodology through section 271.[12] The Eighth Circuit's decision thus fully accords with the Wright, Miller & Cooper treatise on Federal Practice, cited by the FCC,[13] inasmuch as it dealt with an issue that lay within its jurisdiction in the past

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[10] The Act itself prohibits the FCC from extending the terms used in the competitive checklist. Section 271(d)(4).

[11] Section 402(a)(9) of the Communications Act, 47 U.S.C. section 402(a)(9), provides for review of Section 271 decisions in the Court of Appeals for the District of Columbia Circuit.

[12] Indeed, acceptance of the FCC's argument would allow it to evade the jurisdiction of every Court of Appeals except the D.C. Circuit by insertion of any sort of advisory material in a section 271 order.

[13] FCC Pet. at pp. 26-27.

and did not issue a writ to a tribunal whose decision could only be properly reviewed in another Circuit. *See* C. Wright, A. Miller & E. Cooper, 16 *Federal Practice and Procedure* § 3932, at 473-474 (1996) (footnote omitted).

Not only is the Eighth Circuit's decision fully correct; it is not certworthy. The decision is not a departure "from the accepted and usual course of judicial proceedings" as required by the Supreme Court Rule 10(a). The FCC is, not surprisingly, unable to marshal relevant precedent dealing with the unique circumstances in which an agency attempts to use an advisory opinion to defeat a Circuit Court's decision and then claims that advisory opinion is only reviewable in another Circuit. To the extent there is an "important question of federal law . . . " of the kind required by Supreme Court Rule 10(b) it is the construction of Section 252(d), which is already being considered by this Court.

CONCLUSION

The petitions for certiorari already under review involve complex issues arising under sections 251 and 252. They should not be allowed to become vehicles for a general review proceeding of all aspects of the Telecommunications Act of 1996. The new petitions for certiorari now being considered are inconsistent with basic principles of statutory construction and are not independently worthy of review. Indeed, dispositions of the new petitions will be largely ministerial once the Court makes its jurisdictional decision.

The Court should therefore hold the petitions pending review of the Eighth Circuit's decisions in No. 97-826 and related cases. If the Court affirms the jurisdictional ruling of the Eighth Circuit, the petitions must be denied. If the Court reverses the Eighth Circuit on pricing jurisdiction, the petitions should be granted and the writ of mandamus vacated. If the Court grants review and consolidates review of this question with the questions raised in No. 97-826 and related cases, separate argument should be granted.

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QUESTION PRESENTED

Whether the Eighth Circuit—having held in a prior decision that the Telecommunications Act of 1996 gives State commissions, not the FCC, exclusive authority to determine the "just and reasonable rates" for local interconnection arrangements under sections 251(c) and 252(d)—acted within the scope of its jurisdiction and discretion when it enforced its own mandate against the FCC, which, in defiance of the court's prior ruling, had reasserted authority to disregard the State commissions' local rate determinations and to impose its own pricing principles in evaluating an incumbent carrier's compliance with the requirements of sections 251(c) and 252(d).

LIST OF PARTIES AND AFFILIATES

The petitioners seek review of an order of the United States Court of Appeals for the Eighth Circuit. The order arises from the same underlying proceedings as the order challenged in *AT&T Corp., et al. v. Iowa Utilities Board, et al.*, cert. granted, No. 97-826 and related cases (U.S. Jan. 26, 1998). The parties to these proceedings are listed in the appendix to the petition for a writ of certiorari in No. 97-826 at 1a-4a, 73a-78a, 92a.

Pursuant to Supreme Court Rule 29.6, the parties to this brief submit the following statement concerning parent companies and non-wholly owned subsidiaries:

Ameritech Corporation has no parent companies and no non-wholly owned subsidiaries.

Bell Atlantic Corporation has no parent companies. It owns the following subsidiaries having securities in the hands of the public: Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., Bell Atlantic Financial Services, Inc., NYNEX Corporation, New York Telephone Company, New England Telephone and Telegraph Company, Bell Atlantic Credit Corporation, and Bell Atlantic Global Funding Corporation. In addition Bell Atlantic has the following non-wholly owned subsidiaries: One Parkway, Inc., ICA Foreign Financial, Inc., Chesapeake Directory Sales Company, Atlantic West B.V., Grupo Iusacell, S.A. de C.V., Bell Atlantic New Zealand Holdings, Inc., PrimeCo Personal Communications, L.P., Washington, D.C. SMSA Limited Partnership, New York SMSA Limited Partnership, Upstate Cellular Network, Orange County Poughkeepsie MSA Limited Partnership, Pittsfield Cellular Telephone Company, Allentown SMSA Limited Partnership, Reading SMSA Limited Partnership, Pittsburgh SMSA Limited Partnership, Pennsylvania RSA No. 6(II) Limited Partnership, Columbia Cellular Telephone Company,

Anderson Cellular Telephone Company, Las Cruces Cellular Telephone Company, TELE-TV, TELE-TV Media, L.P., TELE-TV Systems, L.P., NYNEX Master Lease Partners, Global Directory Services Company, MEDIATEL spol. s.r.o., Bell Atlantic Information Services Hellas S.A., Polskie Ksiazki Telefoniczne Sp. z o. o., Nord Trans Biuro Reklam Sp. z o. o., NYNEX Worldwide Directories Company, Kipling Associates L.L.C., NYNEX International (Asia) Ltd., and Gibraltar NYNEX Communications Limited.

BellSouth Corporation has no parent companies. BellSouth Corporation's non-wholly owned subsidiaries are 1155 Peachtree Associates, BellSouth New Zealand, Compania de Radiocomunicaciones Moviles S.A., Telcel Celular C.A., Tele 2000, S.A., BellSouth Wireless Data, L.P., RAM Mobile Data Belgium, S.C.S., RAM Mobile Data C.V., BellSouth Carolinas PCS, L.P. (d/b/a BellSouth Mobility DCS in NC & SC), Bloomington Cellular Telephone Company, Chattanooga MSA Limited Partnership, Decatur RSA Limited Partnership, Florida RSA #2B (Indian River) Limited Partnership, Georgia RSA No. 1 Limited Partnership, Georgia RSA No. 2 Limited Partnership, Georgia RSA No. 3 Limited Partnership, Gulf Coast Cellular Telephone Company, Jacksonville MSA Limited Partnership, Lafayette MSA Limited Partnership, Los Angeles Cellular Telephone Company, Louisiana RSA No. 7 Cellular General Partnership, MCTA, Memphis SMSA Limited Partnership, Muncie Cellular Telephone Company, Inc., Orlando SMSA Limited Partnership, Richmond Cellular Telephone Company, Tennessee RSA Limited Partnership, and Terre-Haute Cellular Telephone Company, Inc.

The GTE Entities consist of the following companies, each of which is a subsidiary of GTE Corporation: GTE Service Corporation, GTE Alaska Incorporated, GTE Arkansas Incorporated, GTE California Incorporated, GTE Florida Incorporated, GTE Midwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated,

GTE North Incorporated, GTE Northwest Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE West Coast Incorporated, Contel of Minnesota, Inc., and Contel of the South, Inc. In addition, GTE Corporation has the following subsidiaries or affiliates that have outstanding securities in the hands of the public: BC TELECOM, Inc., BBN Corporation, Cable-Axion Digitel Inc., Cable-Axion Quebec Inc., Caribbean Reservation Center, C. por A., Communications Telefonicas, C. por A., Conagro Telecommunications, S.A., CTI Compania de Telefonos del Interior S.A., CTI North Compania de Telefonos del Interior S.A., Digital Courier International Inc., GTE California Incorporated, GTE Directories Corporation Ltd., GTE Florida Incorporated, GTE Hawaiian Telephone Company Incorporated, GTE Leasing Corporation, GTE Midwest Incorporated, GTE Mobilnet of Florence, Alabama Incorporated, GTE Mobilnet of Jacksonville Incorporated, GTE Mobilnet of Jacksonville II Incorporated, GTE Mobilnet of Wilmington Incorporated, GTE Mobilnet of Wilmington II Incorporated, GTE North Incorporated, GTE Northwest Incorporated, GTE South Incorporated, GTE Southwest Incorporated, GTE Telecom Saudi Arabia Ltd., GTE Yellow Pages Publishing Hungary Kft, La Compagnie de Telephone Anglo-Canadienne/ Anglo-Canadian Telephone Company, MTX Italia, Page Saudi Arabia Services, Ltd., Parque Industrial ITABO, S.A., Quebec-Telephone, Radiowealth, Inc., The Micronesian Telecommunications Corporation, and Zona France Las Americas.

SBC Communications Inc., which has shares outstanding in the hands of the public, is the parent company of Southwestern Bell Telephone Company and Southwestern Bell Yellow Pages, Inc. SBC Communications Inc. has the following non-wholly owned subsidiaries which have shares or partnership interests outstanding in the hands of the public: Abilene SMSA Limited Partnership, Amarillo SMSA Limited Partnership, Buffalo Telephone Company, Cellular Mobile Corporation, Champaign CellTelco,

Dallas SMSA Limited Partnership, Decatur Cellular Telephone Company, Inc., Eastern Missouri Cellular Limited Partnership, Gainesville Development Associates Limited, Gary Cellular Telephone Company, Kansas City SMSA Limited Partnership, Lubbock SMSA Limited Partnership, McAllen/Edinburgh SMSA Limited Partnership, Midland-Odessa SMSA Limited Partnership, Missouri RSA 8 Limited Partnership, Missouri RSA 9 B1 Limited Partnership, Oklahoma City SMSA Limited Partnership, Oklahoma RSA 3 Limited Partnership, Oklahoma RSA 9 Limited Partnership, PTF/FCLC Associates (LP), PTF/GECC (California) Associates (LP), San Antonio SMSA Limited Partnership, SBMS Cellular Telecommunications Bloomington, Inc., SBMS Cellular Telecommunications Springfield, Inc., S.T.L.M. Programming Services Limited, St. Joseph SMSA Limited Partnership, Texas RSA 9B4 Limited Partnership, Texas RSA 10B1 Limited Partnership, Texas/Illinois Cellular Limited Partnership, Topeka SMSA Limited Partnership, Washington/Baltimore Cellular Limited Partnership, Wichita SMSA Limited Partnership, and Worcester Telephone Company.

On April 1, 1997, SBC Communications Inc., Pacific Telesis Group ("PAC"), and SBC Communications (NV) Inc., a wholly owned subsidiary of SBC Communications Inc., completed an agreement and plan of merger by the means of which PAC and SBC Communications (NV) Inc. were merged into PAC, and PAC became a wholly owned subsidiary of SBC Communications Inc. PAC, formerly a publicly held corporation, and its wholly owned subsidiaries, Pacific Bell and Nevada Bell, provide telecommunications services subject to the general jurisdiction of the Federal Communications Commission.

U S WEST, Inc. has no parent company. Financial Security Holdings, Ltd. is a non-wholly owned subsidiary of U S WEST, Inc.

The United States Telephone Association is a non-profit trade association representing the interest of facilities-based local exchange and exchange access providers.

These companies are its full members. USTA also has international members who provide local exchange services in other jurisdictions, and associate members including consultants, manufacturers, banks and investors, and other parties with interests in the local exchange carrier industry. USTA has no parent companies, subsidiaries, or affiliates for whom disclosure is required by Rule 29.6.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

Nos. 97-1519, 97-1520

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF THE LOCAL EXCHANGE CARRIERS IN OPPOSITION

Ameritech Corporation, Bell Atlantic Corporation, BellSouth Corporation, the GTE Entities, SBC Communications Inc., U S WEST, Inc., and the United States Telephone Association, petitioners below, respectfully oppose the petitions for a writ of certiorari.

Petitioners seek review of an Eighth Circuit order compelling compliance with that court's own prior mandate. In July 1997, the Court of Appeals ruled that the Tele-

communications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), "plainly grants the state commissions, not the FCC, the authority to determine the rates involved in the implementation of the local competition provisions of the Act." *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 796 (8th Cir. 1997). Scarcely a month later, in August 1997, the FCC openly defied the Eighth Circuit's ruling. Ostensibly invoking its authority to evaluate a Bell operating company's application to provide long-distance services, the agency announced its intention to ignore the State commissions' rate determinations and to decide for itself what pricing principles should be applied under the Act's local competition provisions. Because the agency's conduct conflicted with the court's prior holding and constituted a direct challenge to its authority, the Court of Appeals issued a writ of mandamus ordering the FCC to obey the prior mandate and to abandon its threat to override the States' substantive pricing determinations under the Act. Pet. App. 1a-2a.[1]

The Eighth Circuit's underlying jurisdictional holding is now before this Court in *AT&T Corp. v. Iowa Utilities Board*, No. 97-826, and related cases ("*Local Competition Case*"). The present petitions should be held pending the Court's decision in that case. If this Court were to affirm the Eighth Circuit's jurisdictional ruling, that court's order enforcing its own judgment would be plainly correct, the current petitions would present no independently certworthy question, and the petitions accordingly should be denied. If, on the other hand, the government were to prevail in its challenge to the jurisdictional ruling, the Eighth Circuit's underlying judgment would be vacated in part, the mandamus order enforcing that judgment would become moot, and these petitions could accordingly be disposed of summarily. Furthermore, granting these petitions would contribute nothing to the Court's consideration of the *Local Competition Case*: Petitioners have al-

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[1] "Pet. App." refers to the appendix to the petition in No. 97-1519.

ready addressed in their merits briefs the issues surrounding the mandamus order. Granting the petitions at this stage would merely add yet another layer of needless complexity—and several more rounds of multi-party briefing—to an already complicated proceeding involving seven discrete questions.

STATEMENT OF THE CASE

1. The 1996 Act. In the 1996 Act, Congress opened to further competition the markets for both local and long-distance telephone service. With respect to local telephone service, Congress chose to rely in the first instance on private carrier-to-carrier negotiations to establish the rates and other terms and conditions for local interconnection arrangements. Where the parties themselves cannot agree on all issues within a prescribed bargaining period, Congress provided that either party may petition the appropriate State commission to arbitrate their differences. 47 U.S.C. § 252(b)(1). Most significantly for present purposes, the Act entrusts solely to State commissions the resolution of disputes concerning the crucial question of pricing. It provides that "a State commission shall . . . establish any rates for interconnection, services, or network elements," in accordance with pricing standards spelled out in the statute. *Id.* § 252(c)(2).

In contrast to its broad reliance on private negotiations backed up by State-supervised arbitrations, Congress assigned the FCC a specifically circumscribed role in implementing the Act's local competition provisions. With a few tightly drawn exceptions,[2] Congress refused to give

[2] For example, if a State commission declines to carry out its responsibilities under section 252, the FCC "shall assume the responsibility of the State commission . . . with respect to the proceeding or matter." 47 U.S.C. § 252(e)(5). In addition, Congress gave the FCC "exclusive jurisdiction" over the administration of "telecommunications numbering," including the responsibility to make numbers available "on an equitable basis." *Id.* § 251(e)(1). It also gave the FCC a role in defining a LEC's duty to provide "number portability," § 251(b)(2); in determining cost recovery

the FCC a charter to intrude on the States' traditional jurisdiction to regulate local exchange facilities and services. In particular, Congress assigned the FCC *no* responsibilities for the pricing of interconnection arrangements.

With respect to long-distance services, Congress established a mechanism for allowing the Bell operating companies (or "BOCs") to compete for the first time with the incumbent long-distance oligopolists (AT&T, MCI, and Sprint). *See* 47 U.S.C. § 271. To satisfy the conditions for long-distance entry, a Bell company must demonstrate that it has complied with a 14-point "competitive checklist" set forth in section 271(c)(2)(B). *See id.* § 271(d)(3)(A). The checklist in turn requires the Bell company to provide, among other things, "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)." *Id.* § 271(c)(2)(B)(i).[3]

2. The Eighth Circuit's Local Competition Decision. In August 1996, the FCC issued a massive 700-page order, prescribing detailed national rules governing every conceivable aspect of local interconnection, including comprehensive and highly technical rules dictating to State commissions the precise formulas they must use in resolving pricing disputes under the Act. Two months later, the Eighth Circuit stayed the FCC's pricing rules because of "what appear[ed] to be a rather clear and direct indica-

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for numbering administration arrangements and number portability, § 251(e)(2); in determining what network elements should be unbundled, § 251(d)(2); in prescribing permissible resale restrictions, § 251(c)(4)(B); and in providing for the treatment of comparable carriers as "incumbents," § 251(h)(2).

[3] The checklist similarly requires "access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)," 47 U.S.C. § 271(c)(2)(B)(ii), "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)," *id.* § 271(c)(2)(B)(xiii), and "services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)," *id.* § 271(c)(2)(B)(xiv).

tion [in the statutory text] that the state commissions"—not the FCC—"should establish prices." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 424 (8th Cir.). This Court subsequently denied repeated applications to vacate the stay. 117 S. Ct. 378, 379 (1996) (Thomas, J., Circuit Justice); 117 S. Ct. 429 (1996).

In July 1997, after further briefing and oral argument, the Court of Appeals held, in the plainest possible terms, that "none of the statutory provisions relied on by the FCC supply it with jurisdiction over the pricing of local telephone service"; on the contrary, the language of the 1996 Act "directly and straightforwardly assigns *to the states* the authority to set the prices regarding the local competition provisions of the Act in subsections 252(c)(2) and 252(d)." *Iowa Utils. Bd.*, 120 F.3d at 795, 797 (emphasis added). The court accordingly vacated as unlawful the FCC's rules purporting to intrude on the pricing jurisdiction that Congress had reserved to the States.

3. The FCC's Response. The FCC made no effort to hide its disdain for the Eighth Circuit's jurisdictional rulings. Immediately after the court entered its stay order, the FCC's then-chairman branded the ruling "a grievous error" and "an astounding piece of judicial activism,"[4] exhibiting "[t]he kind of awesome supremacy that the Chinese emperors would exercise over every rice-picking effort in the country."[5] After the court issued its merits decision, the chairman reiterated his displeasure with the Eighth Circuit's "judicial intervention," accusing the court of "substitut[ing] its judgment for ours" and urging Con-

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[4] Reed Hundt, *Speech Before International Radio & Television Society*, 1996 FCC LEXIS 5840, at *15-*16 (Oct. 18, 1996).

[5] *Hundt Calls Court Stay of FCC Rules Example of Extreme Judicial Activism*, Daily Report for Executives, at C-1 (Oct. 17, 1996).

gress to amend the Act "until courts finally submit to its direction." [6]

On August 19, the FCC put this rhetorical defiance into practice. In an order rejecting on other grounds Ameritech's application for authority to provide long-distance service in the State of Michigan, the FCC went out of its way to announce its intention to disregard the Eighth Circuit's holding that the States alone have jurisdiction to determine the pricing of interconnection arrangements. *Application of Ameritech Michigan*, 12 FCC Rcd 20543 (1997) ("Ameritech Order") (excerpts reproduced at Pet. App. 21a-34a). In a portion of its order expressly unrelated to its disposition of Ameritech's application (*see id.* at 21a), the Commission claimed that its authority under section 271 to evaluate a Bell company's compliance with the "competitive checklist" empowers it to displace the States and to determine for itself the pricing principles that a Bell company must follow under sections 251(c) and 252(d). As if to underscore its point, the FCC proceeded to reimpose for purposes of section 271 precisely the same pricing principles that the Eighth Circuit had vacated a month earlier. *See id.* at 28a-34a.

The FCC attempted to sidestep the Eighth Circuit's decision by stating that, because the court's holding rested on jurisdictional grounds, "[t]he court . . . expressly did not address the substantive merits of the Commission's [vacated pricing] rules," and it therefore "made no ruling concerning the proper meaning of the statutory requirement in section 252(d) that rates must be cost-based." *Id.* at 23a-24a. The agency accordingly asserted that it was at liberty, despite the Eighth Circuit's decision, to re-impose uniform national pricing standards under section 271 that would trump State pricing jurisdiction under sections 251 and 252.

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[6] Reed Hundt, *The Light at the End of the Tunnel vs. the Fog: Deregulation vs. the Legal Culture*, 1997 FCC LEXIS 4330, at *9, *10, *12 (Aug. 14, 1997).

4. The Eighth Circuit's Order Enforcing its Mandate. Soon after the Ameritech Order was released, respondents and a group of 32 State commissions filed separate petitions to enforce the Eighth Circuit's mandate in *Iowa Utilities Board*. After briefing and oral argument, the Eighth Circuit issued a writ of mandamus directing the FCC to comply with the court's prior mandate.

The Court of Appeals stated that the FCC's "attempt to reassert the vacated pricing rules by imposing them as conditions for [long-distance] entry by the Bell Operating Companies . . . does by indirection what we told the FCC in *Iowa Utils. Bd.* it could not do." Pet. App. 8a. Examining the FCC's rationale for its conduct, the court observed that the relevant portions of section 271 "do nothing more than incorporate by reference the specific requirements of sections 251 and 252," and "our July 18 decision clearly held that only the state commissions have the statutory authority to set prices under sections 251(c) and 252(d)." *Id.* at 10a. In light of that earlier decision, the court stated, the FCC's role under section 271 is "quite simple: It must ascertain whether each individual applicant BOC has complied with the individual state commission's pricing scheme applicable to it and in effect at the time of the application." *Id.* at 12a. By imposing on Bell companies, as a condition for obtaining relief under section 271, the requirement that they establish local pricing pursuant to the FCC's pricing methodology rather than the State commission's methodology, the FCC was simply attempting to exercise section 252 pricing authority through section 271. But "the very core of our holding," the court stated, "was that the state commissions—not the FCC—have the exclusive authority to determine the pricing requirements of section 252(d)." *Id.* at 10a. "The FCC may not accomplish indirectly that which we have held it may not do directly." *Id.* at 15a.[7]

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[7] The Court of Appeals explained: "The FCC is free to ask (and indeed has asked) the Supreme Court to reverse our decision [on jurisdiction], and it is free to ask Congress to give it the authority

The Eighth Circuit was further troubled by the fact that the FCC's renewed claim of pricing authority was "calculated to have a chilling effect on the state commissions' employment of . . . pricing schemes [different from those preferred by the FCC], and to do so in a way that avoids our review." Pet. App. 18a. "Having lost in its bid to usurp the power to determine intrastate prices in the Eighth Circuit," and aware that the statute assigns direct review of section 271 orders to the D.C. Circuit, "the FCC now seeks to have another bite at the apple in the District of Columbia Circuit." *Id.* "This is the type of 'evasion' that necessitates mandamus relief." *Id.* The court explained that "[f]ailure to clarify the mandate and direct future compliance where mandamus is the only adequate remedy would 'reward bureaucratic misconduct and encourage judicial anarchy.'" *Id.* at 16a (quoting *Department of the Navy v. FLRA*, 835 F.2d 921, 923 (1st Cir. 1987)).

In line with precedent,[8] the Eighth Circuit took care to craft purely forward-looking relief. Leaving the Ameritech Order itself entirely "untouched," the court sought only to "assure state commissions that the pricing authority granted to them under section 252 is not eviscerated" and to "disabuse the FCC of the mistaken notion that it has the power to enforce the pricing policy judgment articulated" in the advisory portion of the Ameritech Order. *Id.* at 19a. The court accordingly directed the FCC to comply with the mandate in *Iowa Utilities Board* in the future

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to regulate the intrastate pricing of the local competition provisions we have said it does not now have. But in the absence of reversal or Congressional amendment, the FCC may not reassert its interpretation of section 252(d) or reassert its purported authority to mandate [its preferred] pricing schemes for the local competition provisions when our order so clearly denies it that authority." Pet. App. 13a-14a (footnotes omitted).

[8] *American Trucking Ass'ns, Inc. v. ICC*, 669 F.2d 957, *later opinion*, 673 F.2d 82 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983).

and to "cease and desist from attempting to give effect to its interpretation of the substantive [pricing] requirements of section 252(d)." *Id.* at 19a-20a.

ARGUMENT

I. THE PETITIONS SHOULD BE HELD PENDING THIS COURT'S DECISION IN THE *LOCAL COMPETITION CASE*

Because the Eighth Circuit issued its mandamus order solely to enforce its jurisdictional mandate in *Iowa Utilities Board*, this Court's decision on the underlying jurisdictional question will control the disposition of the present petitions. As discussed in the following section, if the Court affirms the Eighth Circuit's judgment, as we believe it should, nothing in these petitions—which attack only the Court of Appeals' established authority to protect its own judgment—will warrant independent review. On the other hand, if this Court were to reverse the Eighth Circuit's jurisdictional ruling, its decision would effectively moot the mandamus dispute. In that event, under this Court's usual practice, the current petitions would be granted, the judgment below would be vacated, and the case would be remanded for dismissal on the basis of mootness. *E.g., Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93-94 (1979); *United States v. Munsingwear Corp.*, 340 U.S. 36, 39-41 (1950). For these reasons, as the Solicitor General correctly suggests, these petitions should be held pending this Court's decision in the underlying case and should be disposed of in light of that decision.

The Court should reject the Solicitor General's alternative request to grant certiorari and consolidate these petitions for review with the pending case. The Court already has before it for consolidated briefing and argument seven discrete questions presented by eight separate petitions and cross-petitions encompassing two different Eighth Circuit judgments, each supported by a separate opinion and each

addressed to a separate and extraordinarily lengthy FCC order. Petitioners and their supporters have filed over 260 pages of opening briefs on these issues, and three additional rounds of briefing will soon follow. The current petitions concern a related Eighth Circuit decision implicating yet another lengthy FCC order. Granting review now would serve only to complicate further a multi-faceted, multi-party case of unusual magnitude and would subject both the Court and the parties to the potentially pointless dedication of still more resources to an issue that, under the government's own view of the case, may become moot. In addition, if certiorari were granted in this case, briefing would proceed on a different schedule from the principal proceeding—making it particularly difficult to coordinate briefs and avoid duplication.

The Court would gain nothing of substance from such an undertaking. Because petitioners have already fully addressed in their merits briefs the respects in which they believe that the Eighth Circuit's mandamus order bears on the issues currently before the Court, further separate briefing on the mandamus issue would be repetitive and would yield no benefits.

Nor is there any merit to petitioners' speculative assertion that immediate review is needed to forestall requests for "a variety of emergency remedies from the D.C. Circuit, perhaps from the Eighth Circuit, and ultimately from this Court"—requests that supposedly will be triggered by the FCC's "compliance with (and interpretation of) the mandamus order." FCC Pet. 29. In the first place, the FCC will confront no genuine issue of "interpretation": it must simply confine its "pricing role" under section 271, as the Court of Appeals directed, to "determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, [long-distance] services." Pet. App. 20a. And if an affected party nonetheless

chooses to apply for emergency relief from any FCC action—an event that is no more likely to occur if this Court holds the current petitions—the courts are amply equipped to respond based on the merits of any such request. Nothing about that hypothetical scenario remotely justifies a premature grant of review.

II. THE PETITIONS PRESENT NO INDEPENDENTLY CERTWORTHY ISSUE

Although holding these petitions is the sensible course given the pendency of a directly related case, the petitions present no question independently worthy of this Court's review. The Eighth Circuit's order is both wholly consistent with the statute and amply supported by settled precedent in this Court and in the courts of appeals.

A. The Court of Appeals Plainly Had Jurisdiction to Enforce Its Own Mandate

Petitioners assert that the Eighth Circuit had no jurisdiction to issue its mandamus order. FCC Pet. 24-27; AT&T Pet. 17 n.4.[9] In their view, because Congress designated "the D.C. Circuit as the exclusive forum for review of 'any order of the Commission granting or denying any application' under Section 271" (FCC Pet. 25), and because a court may issue mandamus only in aid of its own jurisdiction, the Eighth Circuit was powerless to address any defiance of its mandate that the FCC might express in a section 271 order. Petitioners overlook the fact that the Eighth Circuit's jurisdiction had already attached in the prior proceedings in the Eighth Circuit: "The need for an independent basis of jurisdiction is easily applied when jurisdiction has already attached," as in "cases that authorize issuance of a writ to enforce compliance with the mandate rendered on a prior appeal or writ proceeding." C. Wright, A. Miller & E. Cooper, 16

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[9] "AT&T Pet." refers to the petition in No. 97-1520.

Federal Practice and Procedure § 3932, at 473-74 (2d ed. 1996) (footnote omitted).[10]

As this Court has squarely held, that rule applies even where the decision in which the defiance occurs is appealable only to some other court. In *United States v. United States District Court for the Southern District of New York*, 334 U.S. 258 (1948), the Second Circuit had held that it was without mandamus jurisdiction to enforce its prior mandate because the district court's order at issue was by then reviewable only by direct appeal to the Supreme Court. On certiorari, this Court reversed. Rejecting an argument indistinguishable from that advanced here by petitioners, the Court ruled that an appellate court may issue mandamus even "where there is no existing or future appellate jurisdiction to which it can relate." *Id.* at 263. The "high function of mandamus," the Court stated, "may be as important in protecting a past exercise of jurisdiction as in safeguarding a present or future one." *Id.* at 264. The Court accordingly ruled that the court of appeals *did* have mandamus jurisdiction "even though we assume arguendo that all further appeals in the case would come here." *Id.*[11]

The Solicitor General argues that the Eighth Circuit should nonetheless have declined to exercise its mandamus

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[10] *See also Office of Consumers' Counsel v. FERC*, 826 F.2d 1136, 1140 (D.C. Cir. 1987) ("A federal appellate court has the authority, through the process of mandamus, to correct any misconception of its mandate by a lower court or administrative agency subject to its authority. . . . A party always has recourse to the court to seek enforcement of its mandate."); *Potomac Elec. Power Co. v. ICC*, 702 F.2d 1026, 1032 (D.C. Cir. 1983) (invoking "our inherent power to construe the mandate of our earlier decision").

[11] The Solicitor General's reliance (Pet. 26-27) on *In re Ojeda Rios*, 863 F.2d 202 (2d Cir. 1988), is entirely misplaced. The Second Circuit in that case refused to issue mandamus directed to a district judge in Puerto Rico because the Puerto Rico court was not, and had never been, "a district court over which appellate jurisdiction existed." *Id.* at 204. The same reasoning obviously does not apply in this case.

authority because a direct appeal to the D.C. Circuit provided an alternative remedy. FCC Pet. 26 & n.10. But, even if the advisory pricing discussion in the Ameritech Order could properly have been appealed, that would not foreclose the mandamus relief granted here: an alternative remedy can bar mandamus only if it is *adequate*, and an opportunity to relitigate a previous decision is *never* adequate. The Solicitor General's argument to the contrary is again foreclosed by this Court's precedent. In *General Atomic Co. v. Felter*, 436 U.S. 493 (1978) (per curiam), this Court directed mandamus to a state trial court that had defied the Supreme Court's earlier mandate. The Court rejected the argument, echoed here, that mandamus was barred by the availability of immediate appeals within the state-court system: "A litigant who . . . has obtained judgment in this Court after a lengthy process of litigation . . . should not be required to go through that entire process again to obtain execution of the judgment of this Court." *Id.* at 497.[12]

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[12] The cases on which the FCC relies (FCC Pet. 26) did not involve mandamus petitions seeking to enforce a prior mandate. In cases like this one, by contrast, the courts of appeals have not hesitated to grant mandamus despite the availability of an immediate direct appeal. *See, e.g., American Trucking*, 669 F.2d at 960 (granting forward-looking mandamus relief even though the agency's defiance was manifested in immediately appealable orders); *MCI Telecommunications Corp. v. FCC*, 580 F.2d 590, 594, 597 (D.C. Cir.) (granting mandamus because FCC's positions, even though expressed in an immediately appealable order, "are clearly inconsistent with the basic themes of our [prior] decision"), *cert. denied*, 439 U.S. 980 (1978); *Citibank, N.A. v. Fullam*, 580 F.2d 82, 90 (3d Cir. 1978) ("Regardless of the availability of appeal, we think that the writ of mandamus is the proper remedy to compel the district court to comply with our earlier order."); *Yablonski v. United Mine Workers Union*, 454 F.2d 1036, 1038 (D.C. Cir. 1971) (issuing mandamus even though "the order now challenged was appealable"), *cert. denied*, 406 U.S. 906 (1972).

B. The FCC's Renewed Assertion of Pricing Jurisdiction Violated the Eighth Circuit's Prior Mandate

Petitioners' merits argument rests on a manifestly mistaken premise. In their view, because section 271 authorizes the FCC to assess a Bell company's compliance with the competitive checklist, and because the checklist requires interconnection "in accordance with the requirements of sections 251(c)(2) and 252(d)(1)" (47 U.S.C. § 271(c)(2)(B)(i)),[13] section 271 necessarily authorizes the agency to formulate its own substantive pricing standards for interconnection independent of those applied by the State commissions to whom section 252(d) expressly assigns that responsibility. *See* FCC Pet. 15, 28. Petitioners' inference is unwarranted. Section 271 by its terms neither creates pricing standards nor empowers the FCC to define any such standards. Instead, it incorporates the substantive pricing determinations that the statute entrusts to State commissions: the pricing "requirements" to which section 271 refers are the "just and reasonable rate[s]" that are "[d]etermin[ed] by a *State commission*." 47 U.S.C. § 252(d)(1) (emphasis added).

With respect to pricing, therefore, it necessarily follows that the FCC, in passing on a section 271 application, can require no more than interconnection in accordance with the pricing principles promulgated *by the States* pursuant to sections 251 and 252. Contrary to the Solicitor General's supposition, this conclusion does not force the FCC to give "dispositive weight . . . to a state commission's legal evaluation of the Bell company's claims of compliance with Sections 251(c) and 252(d)(1)." FCC Pet. 17. The FCC still has ultimate responsibility for determining, when it reviews a section 271 application, whether a Bell company is in *compliance* with the relevant pricing requirements. The State commissions' responsibility, by contrast, is to *define* the pricing requirements with which

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[13] *See also* 47 U.S.C. § 271(c)(2)(B)(ii); § 271(c)(2)(B)(xiii); § 271(c)(2)(B)(xiv).

the Bell company must comply. Those discrete roles are wholly compatible.

At bottom, of course, petitioners dispute the Eighth Circuit's underlying holding that the States have exclusive jurisdiction to determine the pricing terms of local interconnection arrangements. But that issue is already before the Court in the *Local Competition Case*; for purposes of these petitions, one must assume that the Eighth Circuit was correct. *See* FCC Pet. 14. On that assumption, petitioners' reading of section 271 is nonsensical. Once a State exercises its pricing authority, the resulting determination is legally binding; it establishes the law that a Bell company must follow in setting prices. Under petitioners' theory, however, section 271 empowers the FCC to override a State's pricing determinations and independently dictate the intrastate pricing principles that a Bell company must follow to obtain long-distance entry.

That approach would penalize any State that dared to deviate from the FCC's pricing principles, for its consumers would then be deprived of increased long-distance competition. And a Bell company would be forced either to forsake its rights and obligations under State-approved pricing provisions or forgo its statutorily guaranteed opportunity to apply for long-distance authority. Moreover, because the Bell companies serve roughly 80% of all access lines in the United States,[14] and because the State commissions are unlikely to apply different pricing principles to different carriers subject to their jurisdiction, the coercive effect of the FCC's approach will be felt by all States and all incumbent local exchange carriers.

It is inconceivable that Congress would have intended such a perverse jurisdictional regime—in which the FCC would be free to substitute its own pricing standards for those of a State if, but only if, a Bell company files an ap-

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[14] *See* FCC, Statistics of Communications Common Carriers, Tables 2.3, 2.19 (Dec. 1997).

plication for long-distance authority, and in which the States dare not exercise the pricing authority so plainly assigned to them. Certainly, nothing in the statutory text requires that result. The Solicitor General said as much when he asked this Court to vacate the Eighth Circuit's stay: "Congress intended . . . both the States and the FCC [to] apply consistent principles for interconnection and unbundled access in their respective proceedings under Sections 252 and 271." Application to Vacate Stay, *FCC v. Iowa Utils. Bd.*, No. 96-299, at 31 (filed Oct. 24, 1996). Although the Solicitor General now takes a different view of the matter (FCC Pet. 20, 27-28), he nowhere explains how his reading of the FCC's authority under section 271 can possibly be reconciled with the Eighth Circuit's jurisdictional holding in the *Local Competition Case*.

Petitioners gain nothing from their backup argument that the FCC can override the States' rate determinations under cover of the statute's "public interest" standard. *See* FCC Pet. 16; Pet. App. 28a ("even if it were decided that we lacked authority to review BOC prices as an aspect of our assessment of checklist compliance under section 271 (d)(3)(A), we would certainly consider such prices to be a relevant concern in our public interest inquiry under section 271(d)(3)(C)"). Although it is true that one of the requirements for approval of a section 271 application is that "the requested authorization is consistent with the public interest," 47 U.S.C. § 271(d)(3)(C), that provision cannot sensibly be read to negate the balance of the statute's jurisdictional allocation.

On the contrary, Congress took care to prevent precisely the sort of unbounded interpretation that petitioners here advocate. It specified that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist." 47 U.S.C. § 271(d)(4). For the FCC to hold that subservience to its preferred pricing principles, though not required by sections 251 and 252 or by the checklist, *is* required for purposes of the public-

interest determination would improperly "extend the terms used in the competitive checklist."

Finally, there is no merit to AT&T's assertion that the Eighth Circuit's mandamus order "is in direct conflict with" the D.C. Circuit's decision in *SBC Communications Inc. v. FCC*, No. 97-1425, 1998 U.S. App. LEXIS 5276 (D.C. Cir. Mar. 20, 1998), affirming the FCC's denial of a section 271 application in Oklahoma. *See* AT&T's Supp. Br. 3. The D.C. Circuit neither had before it nor purported in any way to decide whether section 271 entitles the FCC to substitute its pricing policies for those of the relevant State commission under section 252(d). Rather, the D.C. Circuit said only that Congress charged "the FCC, and not the State commissions, with deciding the merits of the BOCs' requests for [long-distance] authorization," and "the statute does not require the FCC to give the State commissions' views any particular weight" in making those decisions. Slip op. 13, 1998 U.S. App. LEXIS 5276, at *21. Neither of those propositions conflicts in any way with the Eighth Circuit's ruling. That the FCC has authority to assess a Bell company's compliance with the checklist's requirements is neither disputed nor in conflict with the Eighth Circuit's holding that State commissions have authority to define the pricing requirements with which the Bell company must comply. The Solicitor General thus correctly acknowledged, before the D.C. Circuit issued its decision, that the *SBC Communications* case did not implicate "the basic issues presented" in the present petitions. FCC Pet. 24 n.8.

CONCLUSION

The petitions for a writ of certiorari should be held pending review of this Court's decision in the *Local Competition Case* and should be disposed of in light of that decision.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

IOWA UTILITIES BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL PETITIONERS

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1. There is one principal reason why the Eighth Circuit's mandamus order is not already the subject of plenary review in this Court: rather than deciding the issue presented last September, when it received respondents' mandamus petitions, the Eighth Circuit did not rule on those petitions until January 22, 1998, literally the eve of this Court's decision to grant certiorari to resolve *all other* disputes concerning the FCC's jurisdiction to implement the 1996 Act. See Fed. Pet. 28. Respondents seek to benefit from that accident of timing in urging this Court to hold this petition and, while holding it, not to look too closely at how the Commission's statutory role under Section 271 draws the Eighth Circuit's underlying *Local Competition Decision* into doubt. See Fed. Pet. 19-20; see also pp. 5-6, *infra*.

This Court often chooses to hold a petition in one case pending its review of a judicial decision in *another* case. Here, however, the Court has already granted review of decisions arising from the *same* review proceeding that

produced the mandamus order challenged in this petition, and that mandamus order addresses a statutory provision (Section 271) that is closely related to, and essential to a complete understanding of, the local competition provisions that this Court has already agreed to interpret. The fortuitous chronology of the Eighth Circuit's decision-making should not keep this Court from having before it the entirety of the Eighth Circuit's treatment of this interrelated statutory scheme.

2. Respondents contend that plenary review of the question presented here is unnecessary because, in their view, this Court's determination of the Commission's jurisdiction to issue general rules implementing the local competition provisions of Sections 251 and 252 will resolve, one way or the other, the present dispute about the Commission's authority to conduct the inquiries required by the Bell Company long-distance provisions of Section 271. That position is both incorrect as a matter of statutory interpretation and unsound as a rationale for deferring this Court's review of the mandamus order. In asking this Court to hold rather than grant this petition, respondents have presupposed, in a stroke of circular logic, a particular (and erroneous) answer to the very question presented in this petition: whether Section 271 could mean something other than what it says.

a. Whatever the scope of the Commission's jurisdiction to issue rules implementing the local competition provisions of the 1996 Act,[1] Section 271 leaves no room for

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[1] Respondents emphasize that Section 252 gives the state commissions authority to set ultimate carrier-to-carrier rates for purposes of resolving specific interconnection disputes. The disagreement underlying the *Local Competition Decision*, however, is not about whether the state commissions have that authority, but about whether, when exercising that authority, the state commissions must follow a nationally consistent methodological framework adopted by the FCC. As we elsewhere explain (*e.g.*, 97-831 Pet. 12-16), the FCC's authority to issue

doubting the Commission's plenary authority to interpret and enforce the statutory conditions for Bell Company entry into the predominantly interstate long-distance market—a regulatory subject that, before and after the 1982 AT&T consent decree, has been a matter of uniquely federal concern. See, *e.g.*, *United States* v. *American Tel. & Tel. Co.*, 552 F. Supp. 131, 153-160 (D.D.C. 1982), aff'd *sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983); see also Fed. Pet. 16-17. Section 271 provides that "[t]he Commission shall not approve" a Bell Company's long-distance application "unless *it finds*," among other things, that such approval would be "consistent with the public interest" *and* that the Bell Company has complied with all 14 items on the checklist, including the substantive pricing requirements of Sections 251(c) and 252(d)(1). 47 U.S.C. 271(d)(3) (emphasis added); see Fed. Pet. 7, 15. In making those determinations, the Commission must employ its own, nationally consistent understanding of what it *means* to comply with those requirements and, similarly, of what "the public interest" requires. See Fed. Pet. 15-18.

Respondents argue that, in crucial respects, the Commission must cede those core inquiries to each of the 50 state commissions, with potentially radical state-by-state differences in methodology and result. That view of Section 271 is so implausible, however, that the D.C. Circuit took special care to reject it when denying a Bell Company's recent challenge to one of the Commission's Section 271 orders. As that court observed, the Commission may grant a Section 271 application only if "the FCC

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rules creating such a framework derives from several independent sources. Those include the Commission's comprehensive statutory authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of federal telecommunications law, 47 U.S.C. 201(b), as well as its obligation to "establish regulations to implement the requirements" of Section 251, 47 U.S.C. 251(d)(1), including the specific rate requirements of Section 251(c)(2)-(4).

concludes *to its own satisfaction*" that the Bell Company has met the requirements of the checklist; in particular, "[a]lthough the Commission must consult with the State commissions, the statute does not require the FCC to give the State commissions' views any particular weight." *SBC Communications Inc.* v. *FCC*, No. 97-1425, 1998 WL 121492, at *6 (D.C. Cir. Mar. 20, 1998) (emphasis added); see also Fed. Pet. 17.[2] That decision is in direct conflict with both the Eighth Circuit's mandamus order and respondents' reading of Section 271. Indeed, like the Eighth Circuit, respondents would compel the FCC to give the State commissions' views not just "weight," but dispositive effect, on what could ultimately be the single most important dispute in Section 271 proceedings: the proper criteria for judging a Bell Company's compliance with the relevant checklist items. As the D.C. Circuit has now confirmed, that approach is irreconcilable with the text, structure, and historical background of Section 271.[3]

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[2] Respondent LECs incorrectly assert (Br. in Opp. 17) that our petition "acknowledged, before the D.C. Circuit issued its decision, that the *SBC Communications* case did not implicate 'the basic issues presented' in the present petitions." In fact, we said that *SBC Communications* and another (still pending) case "will not *require* the D.C. Circuit to address the basic issues presented here," Pet. 24 n.8 (emphasis added), because those cases could be resolved on a variety of independent legal grounds. The D.C. Circuit has now issued its decision in *SBC Communications*, and, as discussed in the text, it has based that decision on grounds that are squarely inconsistent with the Eighth Circuit's mandamus order. Moreover, although respondents labor to distinguish *SBC Communications* on the theory that the D.C. Circuit did not specifically mention "pricing" (see LEC Br. in Opp. 17), the court's holding encompasses all aspects of the Section 271 inquiry. See 1998 WL 121492, at *6 ("Unless the FCC concludes to its own satisfaction that the applying BOC *has satisfied either Track A or Track B* [see Fed. Pet. 7 n.5], *as well as the other statutory requirements*, it 'shall not approve the authorization.' 47 U.S.C.A. § 271(d)(3).") (emphasis added).

[3] Respondents assert that, even though their position would compel the FCC to give dispositive weight to the disparate methodological choices of the 50 state commissions, the FCC would nonetheless retain

b. The FCC's obligation to determine whether a Section 271 applicant has complied with the provisions of Sections 251(c) and 252(d) is powerful evidence that Congress meant to authorize the Commission to issue general rules that the state commissions would apply in adjudicating disputes between new entrants and any incumbent LEC under Sections 251 and 252. As a policy matter, it makes sense for the FCC and the state commissions to apply a single set of national standards in implementing the various aspects of this federal statutory scheme. But the interpretive analysis does not work, as respondents

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the task of determining "whether a Bell company is in *compliance*" with the States' pricing requirements. LEC Opp. 14. Respondents do not elaborate on the nature of that task, and for good reason: in their own view, the task would be meaningless. Under the *Local Competition Decision*, the state commissions, when arbitrating carrier-to-carrier disputes under Section 252, both choose a pricing methodology and set actual rates for (*e.g.*) interconnection and access to unbundled elements. And, under the *Local Competition Decision*, subsequent disputes about an incumbent carrier's compliance with those arbitrated agreements are *also* presented to the state commissions for their resolution. See 97-826 Pet. App. 32a-34a. Thus, whenever it has suited their interests, respondents have insisted that, under their approach, the state commissions' resolution of pricing disputes precludes *any* role for the FCC in addressing pricing issues under Section 271. See *e.g.*, Reply Br. in Supp. of Application by BellSouth for Provision of In-Region, InterLATA Servs. in Louisiana, CC Docket No. 97-231, at 23 (FCC Dec. 19, 1997) ("Because the checklist's pricing standard is that rates * * * must be 'in accordance with the requirements' of sections 251 and 252, the Louisiana PSC's express determination that BellSouth's rates satisfy the Act leaves no federal issue for the Commission to decide.") (citation omitted); Br. in Supp. of Application by BellSouth for Provision of In-Region, InterLATA Servs. in South Carolina, CC Docket No. 97-208, at 37 (FCC Sept. 30, 1997) ("The [South Carolina commission's] pricing determinations are conclusive. * * * Simply put, state commission determinations of the just and reasonable rates that incumbent LECs can charge their competitors * * * are off limits to the FCC.") (internal quotation marks omitted); see also Pet. App. 12a (to perform its "quite simple" role under Section 271, FCC should, *inter alia*, "simply ask[] the state commission whether the applicant BOC has complied with the state commission's pricing rules").

suppose, in the opposite direction. Cf. LEC Br. in Opp. 15-16. Resolution of the Commission's authority to implement the local competition provisions must accommodate, but cannot change, the plain meaning of Section 271.

Thus, even if this Court were to hold that the Commission lacks authority to issue rules implementing Sections 251 and 252, which govern the adjudication of disputes between any incumbent LEC and any carrier seeking entry into local markets, it would *not* follow that the Commission could ignore its obligation, under Section 271, to "conclude[] to its own satisfaction" (*SBC Communications*, 1998 WL 121492, at *6) that a Bell Company has met the checklist requirements and that the Bell's entry into the long-distance market would serve "the public interest." That statutory obligation, rooted in longstanding federal oversight of the predominantly interstate long-distance market, is not somehow contingent upon the scope of the Commission's authority to issue rules implementing the local competition provisions.

For that reason, this Court should grant our petition and consolidate its review of the mandamus order with the rest of this case. We agree with respondents that a reversal by this Court of the jurisdictional holding of the *Local Competition Decision* would require vacating the mandamus order. But an affirmance of that holding would *not* resolve the parties' dispute about whether Section 271 obligates the Commission to exercise independent judgment in adjudicating Bell Company applications for entry into the long-distance market. Nor would it resolve the new conflict between the D.C. Circuit and the Eighth Circuit on what exactly the FCC should do when a Bell Company predicates a Section 271 application on pricing practices that have received the endorsement of a state commission but that are nonetheless, in the Commission's

view, incompatible with the checklist requirements and the public interest.

Other carriers are certain to appeal to the D.C. Circuit any abdication by the Commission of its authority to "conclude[] to its own satisfaction" that the Bell Company has met the statutory requirements for entry into the long-distance market. *SBC Communications*, 1998 WL 121492, at *6. This Court will then need to intervene to relieve the Commission of its conflicting obligations under the mandates of two different courts. The principal question here is whether this Court should resolve that conflict as part of its orderly disposition of this case, or whether it should artificially detach the mandamus order from the rest of this case and resolve Section 271 disputes in a later case or, perhaps, in the context of emergency stay applications. In our view, the former course would better serve this Court, the public interest, and the telecommunications industry.

c. Moreover, unless it grants this petition, this Court's review of the Eighth Circuit's *Local Competition Decision* could not, under any scenario, cure the fatal jurisdictional defect in the Eighth Circuit's mandamus order.

As the above discussion illustrates, the parties disagree about whether, and to what extent, the *Local Competition Decision* has preclusive effect on the criteria that the Commission may employ when adjudicating Section 271 applications. See, *e.g.*, LEC Br. in Opp. 13 (mischaracterizing question of Commission's Section 271 authority as presenting mere "opportunity to relitigate" dispute about Commission's authority to issue rules implementing local competition provisions). But the jurisdictional propriety of the mandamus order depends not on how that dispute should be substantively resolved, but on which *court* has been authorized to resolve it. Congress assigned

that authority, along with authority to resolve all other issues arising in Section 271 adjudications, to the D.C. Circuit, which has extensive experience in addressing complex disputes about the intersection of the local and long-distance telephone markets.[4] The D.C. Circuit can of course give the *Local Competition Decision* whatever preclusive effect it may be due. Respondents would prefer, of course, to have the Eighth Circuit determine the effect of its *Local Competition Decision* on the nature of the Commission's inquiries under Section 271. That preference is particularly understandable now that the D.C. Circuit, in *SBC Communications*, has disagreed with respondents and the Eighth Circuit on whether the Commission must abdicate much of its role under Section 271 to the state commissions. But it is a preference that Congress has foreclosed.

More generally, respondents misapprehend the law governing the circumstances in which a court may exercise jurisdiction to enforce its mandate. A mandamus order is *not* a valid exercise of judicial authority unless the case that it affects is "one that may lie within the prospective future jurisdiction of the court of appeals, *or* that has in fact come within its jurisdiction in the past." 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3932, at 471 (2d ed. 1996) (emphasis added). This mandamus order satisfies neither of those conditions. The *Ameritech Order* and the FCC's other Section 271

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[4] Respondent State Commissions (Br. in Opp. 8) repeat the Eighth Circuit's enigmatic suggestion that the mandamus order somehow leaves the Commission's exercise of its Section 271 authority—as well as the D.C. Circuit's exclusive jurisdiction to define that authority—"untouched." That, however, is a striking mischaracterization of this mandamus order. The order not only bars the Commission from exercising independent judgment on crucial matters arising in any Section 271 proceeding, but also contradicts the D.C. Circuit's subsequent holding, in *SBC Communications*, that the Commission *must* exercise independent judgment when adjudicating Section 271 applications.

adjudications (the subjects of the mandamus order) arise in cases that are separate from, and have never been part of, the local competition rulemaking proceedings subject to review in the Eighth Circuit. Those cases have thus never "come within [the Eighth Circuit's] jurisdiction in the past," and, because Congress has consolidated review of all Section 271 decisions in the D.C. Circuit, they could never "lie within the prospective future jurisdiction" of the Eighth Circuit. *Ibid.*[5] Under respondents' position, however, once a court of appeals has reviewed an agency's order in one case, it may then control the content of that agency's orders in *all future cases* raising arguably related issues, even if Congress has assigned review of those subsequent agency orders *to the exclusive jurisdiction of another court*. Respondents propose no limiting principle to curb that implausibly expansive view of mandamus jurisdiction, perhaps because any limiting principle would necessarily place this mandamus order on the wrong side of the line.

3. Finally, respondents oppose consolidation of the question presented here with this Court's review of the *Local Competition Decision* on the curious ground that the parties have noted the relevance of Section 271 when briefing the question of the Commission's authority to issue rules implementing Sections 251 and 252. See LEC Br. in Opp. 10. That point, however, cuts squarely *against* respondents' efforts to suppress this petition until the

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[5] There is no merit to respondents' reliance on *United States* v. *United States District Court for the Southern District of New York*, 334 U.S. 258 (1948). The question in that case was whether a court of appeals that *had* temporary jurisdiction over one stage of a case (because this Court, which otherwise had direct appellate jurisdiction, was temporarily unable to reach a quorum) had continuing authority to enforce its mandate during a different stage *of the same case*. Here, by contrast, the Eighth Circuit *never* had jurisdiction over the independent Section 271 proceeding that gave rise to the *Ameritech Order*.

conclusion of this case. In effect, respondents have conceded that, because this statutory scheme must be viewed as a whole anyway, granting review of the question presented here would require this Court to expend little additional effort. At the same time, however, respondents seek to impose artificial limitations on the extent to which the Eighth Circuit's interrelated decisions are actually before this Court. Our solution, we submit, makes more sense. There is nothing to lose, and both efficiency and certainty to be gained, from ensuring this Court's ability to review, at one time, the Eighth Circuit's treatment of the various jurisdictional issues arising under the 1996 Act.[6]

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The petition for a writ of certiorari should be granted, and this Court should consolidate its review of the question presented in this petition with its review of the questions presented in the petitions for certiorari in No. 97-831 and related cases. In the alternative, the petition should be held pending this Court's decision in No. 97-831 and related cases.

Respectfully submitted.

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Solicitor General

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Federal Communications Commission

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[6] If this Court grants this petition instead of holding it, we suggest that it simply consolidate oral argument on the question presented here with argument on the remainder of the jurisdictional issues in this case.